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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73-830

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of A. N. CABLE TV CO., INC., WARMINSTER TOWNSHIP, PA. For Certificate of Compliance	CAC-2270 PA12A

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 9, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. A. N. Cable TV Company, Inc., has filed an application for a certificate of compliance to begin cable television service at Warminster Township, Pennsylvania, a community located within the Philadelphia, Pennsylvania-Burlington, New Jersey television market. The applicant proposes to carry the following signals:

KYW-TV (NBC), Philadelphia, Pennsylvania
WPVI-TV (ABC), Philadelphia, Pennsylvania
WCAU-TV (CBS), Philadelphia, Pennsylvania
WPHL-TV (Ind.), Philadelphia, Pennsylvania
WTAF-TV (Ind.), Philadelphia, Pennsylvania
WKBS-TV (Ind.), Burlington, New Jersey
WOR-TV (Ind.), New York, New York
WPIX-TV (Ind.), New York, New York
WHYY-TV (Educ.), Wilmington, Delaware
WLVT-TV (Educ.) Allentown, Pennsylvania

A twenty-channel system with the capacity for two-way communications will be constructed, providing public, educational and local government access channels. This application is unopposed, and in these aspects it is consistent with our rules.

2. The franchise submitted by the applicant was enacted by the Warminster Township Board of Supervisors on October 16, 1972, and amended June 4, 1973. Consequently, the franchise standards of Section 76.31 of the Rules must be satisfied, and insofar as this franchise provides for an annual fee of three percent of gross subscriber revenues in the first year of operation, four percent in the second year, and five percent thereafter for the remainder of the term of the franchise, the reasonableness of that part of the annual fee in excess of three percent must be established.[1] The applicant has indicated that its operations will not be burdened by this rate, particularly as it will have no significant effect on the system as it begins service. The follow-

[1] Section 76.31(b) of the Rules; Paragraph 186, *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, at 209.

104-006—73——1

ing justification for this gradual rise in the annual fee is provided on behalf of Warminster Township:

> The eventual rise is necessary in light of the planned regulatory program. In the first place, the Township intends to maintain supervision over the franchise. In the second place, the franchisee intends to use both above-ground and below-ground modes of distribution. The combination of which will complicate supervision. In the third place, the Township is constituted by a large land area, having the third largest population in the County and the third most significant County increase in population in the past decade (118.2%).

The Township also submits that an eventual five percent franchise fee is justified by the presence of another cable television system in the community—Bucks County Cable TV, Inc.—which will operate on the authority of a 1965 franchise requiring an annual fee of 5¼ percent. On March 8, 1973, the Chief, Cable Television Bureau, pursuant to Section 0.289(c)(12) of the Rules, granted a certificate of compliance to Bucks County Cable TV, Inc., and this certificate is valid until March 31, 1977.

3. While the franchise fee is clearly within the zone of reasonableness contemplated by the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, more data should have been provided concerning the planned local regulatory program. In terms of specific plans and proposals, the showing is far from satisfactory. For instance, it would be helpful to know whether the Township intends to supervise the cable system with persons hired specifically for this task, or whether present officials will be expected to perform additional regulatory duties. If so, will the Township designate someone to receive and resolve subscriber complaints and will citizens be advised of his accessibility? Then too, no financial data has been submitted. We cannot begin to calculate the relationship between the additional fees the Township will collect and the estimated cost of the local regulatory progam. However, we must take cognizance of certain countervailing considerations: the higher fees assessed by the franchise will not be collected until the system is well beyond its first, and usually most difficult, year of operation. Moreover, its competitor is likely to obtain an insuperable economic advantage unless this application, otherwise fully consistent with our rules, is granted at this time. We believe a solution to this dilemma lies in a short-term grant, valid only until March 31, 1977. This should permit A. N. Cable and Bucks County Cable TV to compete on an equal footing and will require the resubmission of their franchises before our certification can be renewed. To obtain renewals, both franchises must comply with Section 76.31 of the Rules. If the franchise fee still exceeds three percent, then the reasonableness of that fee must be established along the lines we have indicated in this decision, or which may be developed in the future.

In view of the foregoing, the Commission finds that a grant of this application would serve the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance filed by A. N. Cable TV Company, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-821

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate Telephone Service, Transmittal Nos. 10989, 11027 and 11657	Docket No. 19129

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. The Commission has before it for consideration several petitions for reconsideration of three Commission actions previously taken in this proceeding. The three actions for which reconsideration is sought are (a) our October 18, 1972 Memorandum Opinion and Order [1] holding that the Commission's January 12, 1971 request to AT&T to postpone the effective date of its November, 1970 rate schedules pending the outcome of an expedited hearing constituted a suspension within the meaning of the then Price Commission's regulations, (b) our November 22, 1972 Decision and Order [2] on rate of return (Phase I Decision), and (c) our January 10, 1973 Memorandum Opinion and Order [3] granting AT&T permission to file its proposed MTS (message telecommunications service) and WATS (wide area telephone service) rate increases in accordance with the Phase I Decision. We will discuss each of our previous actions separately, hereinbelow.

A. MEMORANDUM OPINION AND ORDER OF OCTOBER 18, 1972

2. In this Memorandum Opinion and Order we held that the Commission's January 12, 1971 request to AT&T to postpone the effective date of its November 1970 rate schedules pending the outcome of an expedited hearing constituted a "suspension" within the meaning of the then Price Commission's regulations. The Trial Staff filed a Petition for Reconsideration of this Order, which was opposed by the American Telephone and Telegraph Company and the Associated Bell System Companies (AT&T). These pleadings set forth opposing views

[1] 37 F.C.C. 2d 754 (1972).
[2] 38 F.C.C. 2d 213 (1972).
[3] 38 F.C.C. 2d 984 (1973).

as to the interpretation which should be given to the term "suspension" as used in the then effective Price Commission's regulations.[4]

3. Subsequent to the filing of the pleadings in this matter, the Price Commission's regulations, on January 11, 1973, were suspended by the Cost of Living Council Phase III Regulations.[5] Since the Phase III Regulations did not provide for suspension of Interim rate increases, and the Price Commission's Phase II regulations are no longer operative, it is unnecessary for us to reconsider our interpretation of "suspension" as that term was used in the now-superseded regulations. Therefore, the Trial Staff's petition for reconsideration is dismissed as moot.[6] Moreover, we consider our Memorandum Opinion and Order of October 18, 1972 to be interlocutory as to which petitions for reconsideration are inappropriate. (See Sections 1.106(a)(1); and 1.291 (c)(3) of our Rules).

B. DECISION AND ORDER OF NOVEMBER 22, 1972, ON RATE OF RETURN

4. Petitions for reconsideration of our Decision and Order on rate of return (hereinafter "Phase I Decision" or "Decision") have been filed by AT&T, Microwave Communciations, Inc. (MCI), the Secretary of Defense (DOD) and the City of Chicago (Chicago). Oppositions to these petitions have been filed by the Trial Staff, AT&T, DOD, United States Independent Telephone Association (USITA), jointly by American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC), and jointly by the Commonwealth of Pennsylvania and the State of New Jersey. AT&T, MCI and DOD replied to the oppositions.

5. In its Petition for Reconsideration, AT&T argues that there are several reasons why the Commission's Decision provides an inadequate return on equity. AT&T states that the Decision places principal reliance on the analysis submitted by Dr. Myers who used the Discounted Cash Flow (DCF) method of estimating the cost of equity capital. However, AT&T maintains that, although the Commission explicitly stated that proper use of the DCF method requires recognition of "additional factors for safety, market pressure and other allowances,"[7] Dr. Myers made no such allowances. While it is true that Dr. Myers may have made no specific arithmetical computations to quantify some of the adjustments he made for the other factors, the record shows that he took into account various factors to arrive at his recommended 10.5% equity return for AT&T.[8] More-

[4] Section 300.307(c)(1) of the Price Commission's regulations, 6 C.F.R. § 300.307(c)(1) (1972), provided, in pertinent part that:

> [a]ny interim rate which is authorized by a regulatory agency . . . may not be placed into effect until . . . [t]he regulatory agency has suspended the interim rate for the maximum period authorized by law, and such suspension period has run unless . . . [the interim rate] represents a price increase of the same or a lesser amount than a previously filed rate for the same or equivalent service which has been suspended for the maximum period, and that suspension period has run.

[5] 6 C.F.R. §§ 130.1–.110 (1973).

[6] It should also be noted that the Price Commission had ample opportunity following our action of October 18, 1972, to indicate any disagreement it might have had with our interpretation of its rules, and it did not so indicate.

[7] 38 FCC 2d 213, 236 (1972).

[8] 38 FCC 2d 213, 264 (1972).

over, we made it clear in our Decision that we considered all relevant factors. We stated that "[t]here are many techniques for producing useful factual information as a basis for determining the equity return which should be allowed in the computation of the overall fair rate of return," and that ". . . in the final analysis, large areas of judgment must be applied to each of the measurements used." Finally, we stated that "[t]herefore, while not attempting to make specific findings with regard to each measurement, we find that it is reasonable to conclude that, on the basis of the evidence in this record and the subsequent factual information of which we have taken official notice, 10.5% is the minimum return on equity required by Bell." [9]

6. AT&T complains that the Decision did not properly compare AT&T's cost of equity with that of the regulated electric utilities. AT&T contends that Dr. Myers testified that AT&T's cost of equity capital should be equivalent to that of Moody's 24 Electrics; that, since Dr. Myers found the DCF cost of capital for such electrics to be 11.4 percent, consistent application of Dr. Myers' analysis requires a finding of a DCF return for AT&T of 11.4 percent. We disagree with AT&T's characterization of Dr. Myers' testimony. His testimony was to the effect that AT&T's cost of equity capital would be equivalent to Moody's 24 Electrics *if* the market for AT&T's stock were composed entirely of "well-diversified" investors. However, Dr. Myers made it clear that this situation did not exist and that the market is made up of both undiversified and well-diversified investors (Tr. 4175–76). Moreover, the record shows that Dr. Myers' cost of equity recommendation of 10.5 percent was based upon more than comparison with the electrics and included detailed analyses of (a) current interest rates, (b) past interest rates, (c) price-earnings ratios, (d) DCF formulas using past trends, and (e) DCF formulas with explicit analysis of AT&T's prospects (Trial Staff Ex. 53, pp. 69–70).

7. AT&T goes on to argue that the sale reason stated in the Decision for concluding that its equity risks are not comparable to those of the electrics is that AT&T's debt ratio is significantly lower than the debt ratio of the electrics and that despite AT&T's lower debt ratio, Dr. Myers found that the relative risks on common equity were equivalent for AT&T and the electrics. While in this instance AT&T is relying solely on the testimony of one witness, our Decision considered not only this testimony but all the other evidence of record as well [10] in arriving at our conclusion that "inasmuch as Bell appears to concede that the higher the debt ratio the higher the risk to equity holders, it would appear from this factor alone that at the present time and for the foreseeable future Bell's equity holders are and will be subject to less risk than the equity holders of electrics." [11] In any event, notwithstanding any conclusions which we may have reached regarding the relative risks on common equity based on comparative debt ratios between AT&T and the electrics, AT&T is incorrect in stating that the sole reason stated in the Decision for concluding that its equity risks are not comparable to those of the electrics is that

[9] 38 FCC 2d 213, 238 (1972).
[10] In fact, AT&T witness Scanlon acknowledged that ". . . investors may not be willing to pay for the full margin of safety that the lower debt ratio afforded" (Tr. 3790).
[11] 38 FCC 2d 213, 234 (1972).

AT&T's debt ratio is significantly lower than the debt ratio of the electrics. We stated:

> However, for the reasons stated above [i.e., Bell's lower debt ratio] *and by the Examiner*, we reject Bell's claim that its equity earnings should be geared at 12.5% to match the earnings of electrics on their equity. (Emphasis added).[12]

The additional reasons cited by the Examiner in his Initial Decision (I.D.), and relied upon by the Commission in its Decision, are as follows:

> (a) The risk of public ownership is higher for electrics (I.D., para. 49);
> (b) Bell can point to nothing comparable to the delays and protests experienced by the electrics regarding the use of new technologies (I.D., para. 49);
> (c) Bell does not have the risk of widespread and immediate operational breakdown (I.D., para. 49);
> (d) There is no evidence in the record to justify disturbing the Commission's earlier finding in Docket 16258 that Respondents are less risky than individual electric companies (I.D., para. 50);
> (e) There is no evidence that additional competition will result in any significant impact on AT&T's revenues or MTS users (I.D., para. 50);
> (f) Considering all the evidence and prior decisions, ". . . AT&T appears to be relatively less risky and more stable to a definitive extent" (I.D., para. 50);
> (g) There is no data in the record showing whether returns actually earned by electrics are authorized by Commissions as fair and proper rates of return (I.D., para. 64).

8. AT&T maintains now that the spread of 3¼ percentage points between the current cost of long term debt (7¼ percent) and the return on equity (10½ percent) allowed in the Decision is insufficient, and that this is particularly true in view of the fact that the historical spread between debt cost and equity cost for the electric utilities has been about 7 percentage points. As has been pointed out above as well as throughout the Decision, a comparison of AT&T with the electric utilities is helpful but not controlling, as it is only one of many factors which were considered in determining AT&T's rate of return. In addition, as was stated in the immediately preceding paragraph, AT&T's debt ratio is significantly lower than that of the electrics. This factor alone can be responsible, not only for AT&T's lower risk, but also for the smaller spread between debt and equity cost for AT&T. Furthermore, AT&T seems to realize the validity of this reasoning, because, its November, 1970 tariff filing reflects a spread of only 3½ percentage points between current debt (9 percent at that time) and requested equity (12½ percent).[13]

9. AT&T argues that the Commission dismissed any reliance on the Gordon model update, because AT&T did not produce Dr. Gordon as a witness to qualify the updating. This was only one of several grounds for rejecting the alleged updated Gordon model. The Administrative Law Judge found at paragraph 62, among other things, that:

> AT&T's effort to utilize the Gordon model for its own purposes while continuing to disclaim its usefulness for the very kind of finite determina-

[12] *Ibid.*

[13] It should also be noted that while interest rates dropped from around 9 percent at the time of the tariff filing to 7¼ percent at the time of the hearing, AT&T did not reduce its request for a 12½ percent equity return.

> tions that are required in this proceeding, renders it of no evidential value, even apart from the question [of] whether AT&T's updating of this model was faithful to Professor Gordon's methodology.

We stated our agreement with the Administrative Law Judge's conclusion, and his reasons therefor, that no weight should be given to the updated Gordon model.[14]

10. AT&T maintains that the Decision erroneously bases the amount of the authorized rate adjustment on 8.0 percent as the going level of earnings. It is argued that none of the data set forth in paragraph 117 of the Decision supports this conclusion. AT&T would have us use the data from the most recent 12 month period, after adjusting for the full year's effect of the May 4, 1972 private line rate increases. In its original filing of November, 1970 AT&T employed a *prospective* view of 1971 as the test year. Now however, AT&T takes the inconsistent position that we should look *backward*. Our goal was to determine as best as possible, the *current* level of earnings. At the time of our Decision, the most recent experience indicated to us that message volume and average revenue per message were increasing and that, for the reasons stated,[15] 8.0 percent was a reasonably accurate estimate of AT&T's going level of earnings. In any event, the passage of time since our Decision has allowed us to examine the operating results for the fourth quarter of 1972 and the first quarter of 1973. AT&T's earnings for each of these quarters was 8.09 percent and 8.58 percent, respectively. The first quarter of 1973 reflects the January 22, 1973 MTS increases. These latest figures substantiate the validity of our determination of AT&T's going level of interstate earnings.

11. For the reasons stated above, AT&T's Petition for Reconsideration will be denied.

12. MCI's Petition for Reconsideration seeks to raise the issue of rate relationships between MTS and the other services offered by AT&T. Specifically, MCI argues that the Commission should not have denied its exception to the Administrative Law Judge's ruling excluding the expert testimony of D. Edwin Winslow, which sought to show that the imposition of the entire rate increase on MTS would automatically result in discrimination against users of that service. MCI has attacked the Decision for failing to find that continuance of the rates which went into effect on January 26, 1971 will be unjust and unreasonable. MCI goes on to argue that, in the absence of a final decision in Docket No. 18128, any increase in the rate of return should be effectuated by increasing charges for all services proportionately. All of the arguments advanced by MCI relate to a determination of the proper rate relationships between MTS and AT&T's other services. We have ruled on at least four prior occasions that the question of rate relationships between AT&T's various services will be resolved in Docket No. 18128, and is not in issue in Phase I of this proceeding.[16] We believe that our reasoning in these decisions is sound and needs no further amplification; and therefore, MCI's Petition for Reconsideration will be denied.

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[14] 38 FCC 2d 213, 232 (1972).
[15] 38 FCC 2d 213, 249–50 (1972).
[16] 27 FCC 2d 151, 155–7 (1971); 30 FCC 2d 503 (1971); 38 FCC 2d 213, 216–7, 246 (1972); 38 FCC 2d 492, 493 (1972).

13. In its Petition for Reconsideration, DOD advanced two reasons why the Commission erred in setting the cost of equity capital at 10.5 percent rather than the 10.3 percent found by the Administrative Law Judge. First, DOD points out that the Administrative Law Judge found that the current cost of debt was between 7.5 percent and 8.0 percent, but the Commission found that the proper range was from 7.25 percent to 7.50 percent. DOD then argues that Dr. Myers testified that changes in interest rates correspond in direction to changes in cost of equity capital, and that, since the Commission found that the existing cost of debt is less than the cost of debt anticipated by the Administrative Law Judge, it follows that this decrease must be reflected in the cost of equity capital. Secondly, DOD argues that, as the debt ratio decreases, the risk to equity holders decreases, and as the risk decreases, the returns expected must decrease. Therefore, DOD contends that the Commission, in setting aside the 48 to 52 percent debt ratio and adopting a lower debt ratio of 45 percent should have decreased—not increased—the return on equity found to be reasonable by the Administrative Law Judge. As was conceded by AT&T, "the relationship between equity costs and current debt costs is not precise or linear," and the same is certainly true of the relationship between equity costs and the debt ratio. DOD's approach is erroneously premised on the assumption that the Commission accepted as correct the Administrative Law Judge's determination of equity return (10.3 percent) based on a debt ratio of 48 percent and current cost of debt between 7.5 and 8.0 percent. The fact is that we specifically rejected the Administrative Law Judge's findings on this point and cited a number of other economic and judgmental factors which must be given weight in this regard.[17] Therefore, we reject DOD's arguments and will deny its Petition for Reconsideration.

14. Chicago urges that the maximum allowable rate of return should be 8.2 percent. Chicago offers no support in the record for this conclusion and has cited no erroneous findings in our Decision in this regard.[18] Its Petition for Reconsideration will be denied.

C. MEMORANDUM OPINION AND ORDER OF JANUARY 10, 1973

15. Pursuant to our Phase I Decision on rate of return, AT&T submitted proposed MTS and WATS rate increases seeking to implement the Decision. We invited comments on these proposals from the parties to this proceeding by Order [19] and from all other interested persons by Public Notice.[20] Comments were received both opposing and supporting the proposed tariff filing, and AT&T responded to the adverse comments. On January 10, 1973, upon consideration of all comments filed up to that time and AT&T's response thereto, we adopted a Memorandum Opinion and Order granting AT&T permission to file its proposed MTS and WATS rate increases. However, after January 10, 1973 MCI and the Trial Staff filed replies to AT&T's response to their comments and, in addition, the Trial Staff filed a

[17] 38 FCC 2d 213, 236–8 (1972).
[18] This petition fails to comply with Section 1.106(d) requiring particularity as to findings of fact alleged to be erroneous.
[19] FCC 72–1102.
[20] Report No. 8209.

Petition for Reconsideration which was opposed by AT&T and USITA.

16. In their post-decision pleadings both MCI and the Trial Staff maintain that our action was premature and should not have been taken without affording them the opportunity of filing replies.[21] They maintain that since the procedures specified [22] for commenting on AT&T's rate proposal are not covered by any specific provision of the Commission's Rules, then Section 1.45 [23]—which is the general section on pleadings and which allows for replies—is applicable. We disagree. Our Public Notice (Report No. 8209) and our Order (FCC 72-1102) requested comments by December 21, 1972 and did not authorize the filing of replies to those comments. Reliance by the Trial Staff and MCI on Section 1.45 is misplaced in that the comments which we invited were not "motions," "petitions" or "requests" within the meaning of that Section.

17. The Trial Staff contends in its Petition for Reconsideration that our decision was in error for the following additional reasons:

> (a) "It failed to treat with numerous substantive matters raised in the Trial Staff's Petition to Reject AT&T's Tariff Proposal or, Alternatively, to Set That Proposal for Hearing", filed December 21, 1972, and the Trial Staff's Reply, filed January 11, 1973, to Respondents' Opposition to that petition.
>
> (b) "It permitted the tariff schedules to go into effect even though such schedules were discriminatory on their face and the Respondents failed to present even a *prima facie* showing that such schedules were just, reasonable and non-discriminatory.
>
> (c) "It did not require Respondents to present a *prima facie* justification of the rate making principles employed.
>
> (d) "It failed to describe in legally sufficient detail the bases for the conclusions reached."

18. With respect to its point (a), the Trial Staff's basic contention is that our decision incorrectly stated the issue to be resolved. In our decision we stated that the "essential and single issue before us at this time is whether AT&T has made a sufficient showing that its proposed rate schedules have been reasonably designed to afford it the revenue relief in the amount we determined in Phase I of this proceeding to be required."[24] The Trial Staff states that this was not the issue; it argues that the issue was whether the rate schedules we allowed to be filed would allow AT&T to "earn well in excess of 8.5% and up to 9%; i.e., have additional income of double that the Commission contemplated without opportunity for recovery under the Commission's accounting order;" that there should have been a hearing at which AT&T would be required to prove that "the new tariff schedules would not in fact result in increased earnings in excess of $145 million;" that AT&T's "increased earnings could deviate substantially from the authorized $145 million;" and that the Commission should have taken action to afford relief and protection to rate payers "against increases in revenue resulting from the revised schedules in excess of $145 million." In our Decision of November 22, 1972 we authorized rates which, as

[21] MCI's comments on this point are contained in a Petition for Special Relief filed concurrently with its Reply. The Trial Staff's comments on this point are contained in its Petition for Reconsideration.

[22] *See* 38 FCC 2d 213, 246, para. 109 (1972); FCC 72-1102; and Public Notice, Report No. 8209.

[23] 47 C.F.R. § 1.45.

[24] 38 FCC 2d 984, 985 (1973).

of the time of filing, would produce a return of 8.5%—the lower part of the 8.5–9.0% range of reasonableness prescribed by that Decision. For reasons stated in our January 10, 1973 Decision, we believe that the rates actually filed meet that objective in a reasonable manner and in fact, actual interstate operating results realized since that filing tend to confirm this judgment. But to the extent that the Trial Staff's argument is to the effect that the filed rates must, under any and all circumstances, produce no more than 8.5%, we cannot agree. For clearly, no revised interstate message toll rate schedule can lay claim to such exactitude in view of the variability or unpredictability of the many economic factors that operate over any period of time to produce the level of interstate earnings. This, of course, was not the reason for our prescription of 8.5–9.0% as the range of reasonableness. Essentially, that range is intended as our criteria for measuring the reasonableness of AT&T's interstate rates and earnings and the need for adjustment therein. Assuming, therefore, that AT&T's rates were reasonably designed to strike a going level of earnings of 8.5%—and we believe this to be a reasonable assumption—our Decision does not prohibit earnings up to 9.0%. Specifically, we have stated in our Decision ". . . if Bell is able, through improved efficiency or productivity gains, for example, to increase its earnings under such rates within a reasonable range above 8.5%, we should consider such increased earnings to be acceptable without regulatory action on our part." Accordingly we reject these contentions of the Trial Staff.

19. In its point (b), the Trial Staff makes the contention that any tariff filed by a carrier must be rejected and returned to the carrier if it is not accompanied by a *prima facie* showing that all of the rates therein are just, reasonable and free of undue discrimination, i.e., in full compliance with Sections 201 and 202 of the Act. The argument is made that AT&T's tariff revisions in question were not accompanied by such *prima facie* showing and that, therefore, AT&T's tariffs must be rejected. We disagree with this contention. The Trial Staff cites no statutory or other support for the sweeping proposition that tariffs must be rejected that are not accompanied by a *prima facie* showing of compliance with Sections 201 and 202 of the Act. We find no such rigid requirement in the Act or in any of our implementing rules. While it is true that Part 61 of our rules requires extensive data and information to be submitted by a carrier to support significant tariff revisions, we have heretofore made it clear that the purpose of obtaining this information is not to require the carrier to make a *prima facie* showing of lawfulness on penalty of summary rejection but "is to elicit information and data which will facilitate the Commission's judgment as *to whether such proposed tariffs present questions of lawfulness which warrant our investigation and hearing.*" (our *underlining*) 40 FCC 2d 147; p. 153 (1973). Thus, a carrier may fail to make a *prima facie* showing of lawfulness at the time of filing tariff revisions, even though it supplies all of the data and information required by our rules. Nevertheless, we are not obligated to reject such tariffs. To the contrary, where questions of lawfulness are raised by a tariff filing that is otherwise in compliance with our rules, and where we cannot or should not resolve such lawfulness issues without further investigation and hearing, we are expressly permitted by the Act to allow such

tariffs to become effective and, in our discretion, to designate such tariffs for hearing with or without a suspension and refund order. 47 USC 204. We followed the proper course of action in this case by allowing the tariffs in question to be filed and to become effective on an interim basis subject to a final determination of lawfulness thereof through further proceedings. Accordingly, we reject this contention by the Trial Staff.

20. The Trial Staff contends in its point (c) that the MTS rate adjustments, involving increases for certain mileage bands in certain categories of service but not others, resulted in rates which were on their face patently and unjustly discriminatory and in violation of Sections 201–203 of the Communications Act. We considered this argument in our January 10, 1973 Order. We do not agree that these schedules were "patently" unlawful. We stated then and we reiterate now that on the basis of AT&T's presentation of supporting materials we were persuaded that we should allow AT&T to file its new increased rates as an interim rate schedule. On the other hand, we did not find as a matter of law that its new rate schedules were just, reasonable and free of undue discrimination within the meaning of Sections 201–202 of the Communications Act, and we specifically reserved the resolution of all such questions to further hearings. These rate increases (as well as the rate increases of January, 1971) are, and will continue to be subject to accounting and refunds until all questions of lawfulness are resolved.

21. With respect to point (d), the Trial Staff points out that we stated in our January 10, 1973 Order that "[o]ur staff has not verified in detail all of the procedures and computations undertaken by the AT&T technicians in structuring and applying [AT&T's econometric] model." [25] However, contrary to the Trial Staff's assertions, the Commission has not accepted as valid the AT&T model on long-distance demand. Examination of the validity of this model as well as the underlying demand and cost data was reserved for Phase II of this proceeding. We stated that, based on our examination of all available relevant information, as well as certain independent calculations made by our staff, that "[w]e are satisfied . . . that the proposed rates were reasonably designed to produce the additional net income before Federal income taxes of $145 million authorized in our Decision." [26] The Trial Staff has presented no persuasive argument to warrant our modifying this conclusion.

22. For the reasons stated above, the Trial Staff's Petition for Reconsideration will be denied.

23. Accordingly, IT IS ORDERED, That the petitions for reconsideration listed in paragraphs 2, 4 and 15 above are HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[25] 38 FCC 2d 984, 986 (1973).
[26] 38 FCC 2d 984, 986 (1973).

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate Telephone Service Transmittal Nos. 10989, 11027 and 11657	Docket No. 19129

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 10, 1973)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT IN WHICH CHAIRMAN BURCH JOINS; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. On November 22, 1972 we issued our Decision and Order on rate of return in Phase I of this proceeding.[1] Pursuant to that Decision and Order, AT&T filed proposed rate schedules providing for increases in its Message Toll (MTS) and Wide Area Telephone (WATS) rates, and on January 10, 1973, we adopted a Memorandum Opinion and Order granting AT&T permission to file its proposed MTS and WATS rate increases, on 10 and 60 days' notice, respectively.[2]

2. Because the WATS rate schedules had not previously been expressly placed in issue in this proceeding, we adopted a Memorandum Opinion and Order on March 7, 1973 (WATS Order) which entered a suspension and accounting order with respect to the increased WATS rates, and formally added the following issues:

> a. The amount of operating revenues that are or may reasonably be expected in the foreseeable future from interstate communication services rendered by use of the plant and facilities of the Bell System as a consequence of the particular WATS rate levels suspended herein, with particular reference to the projected gross revenues to be derived therefrom, the changes in traffic level and usage patterns anticipated as a result of the rate change, and the associated changes in expense level;
>
> b. The cost justification, demand factors and other pertinent consideration in respect to the structure and differing rate levels herein suspended for all categories of WATS services;
>
> c. In light of determination as to the foregoing, whether the instant increases in WATS rates are just and reasonable within the meaning of Section 201(b) of the Communications Act of 1934, as amended;
>
> d. Whether the specific charges for WATS service herein suspended will subject any person or class of persons to unjust or unreasonable discrimination, or give any undue preference or advantage to any person, class of persons, or locality, or subject any person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage within the meaning of Section 202(a) of the Communications Act of 1934, as amended;

[1] 38 F.C.C. 2d 213 (1972).
[2] 38 F.C.C. 2d 984 (1973).

> e. Whether the Commission should prescribe just and reasonable charges or maximum or minimum or maximum and minimum charges to be hereafter followed with respect to WATS service and, if so, what charges should be prescribed.[3]

In addition we ordered that:

> AT&T shall make no changes in the schedules herein suspended during the pendency of this proceeding without prior approval of the Commission.

3. We now have before us a Petition for Clarification of Issues and To Establish Schedule filed by the Common Carrier Bureau's Trial Staff and opposed by AT&T, and a Petition for Reconsideration filed by AT&T and opposed by the Trial Staff and Microwave Communications, Inc. Both sets of pleadings are directed at our Memorandum Opinion and Order of March 7, 1973.

4. In its Petition, the Trial Staff points out that, in the last full investigation of AT&T's WATS rates in Docket No. 13914 the Commission adopted [4] the Recommended Decision of the Chief of the Common Carrier Bureau [5] which reached the following conclusions:

42. . . .

> a. The overall level of WATS rates appears to be productive of sufficient revenue to recover the costs incurred in furnishing the service and to be fully compensatory. However, as discussed in paragraph 30, AT&T's estimates with respect to its cost savings and operating results expected from the WATS service require further testing in light of the substantial usage experience now available, particularly to determine the effects of the WATS offering on peak-hour traffic and whether stimulation resulting from either the full-time or measured-time service has caused additional usage with resultant increases in cost.
>
> b. As developed in paragraphs 32–36, further examination is required of the relationship between WATS rates for full-time and measured-time service to ascertain, in light of current usage of WATS, whether the measured-time users are bearing a disproportionate share of the costs incurred in furnishing the WATS service and whether current revenue requirements applicable to the total service are being met.
>
> c. As developed in paragraph 37, it does not appear from this record that there is need for a full-time class of WATS service, and a question is raised as to why all service should not be priced on a measured-time basis, with the appropriate full-time rate being established as the maximum charge regardless of usage.
>
> d. As developed in paragraph 41, consideration should be given to the feasibility and economic justification of extending the measured-time features of the WATS offering so as to make it available to customers who have a usage requirement of less than 15 hours' monthly service.

43. In view of the economies made possible by direct distance dialing—which economies AT&T advances as justification for the WATS offering—a basic question arises as to whether the rates applicable to the station-to-station classification of interstate message toll telephone service fairly and adequately reflect those economies or whether the relatively small group of WATS users is being given an undue preference in this respect.[6]

The Trial Staff states that, although it believes these matters should be considered herein, our WATS Order does not explicitly state that

[3] 40 F.C.C. 2d 18 (1973).
[4] 38 F.C.C. 475 (1965).
[5] 37 F.C.C. 2d 688 (1964).
[6] *Id.* at 701, 704.

these questions are embraced by the issues set forth therein, and it therefore wishes us to clarify our Order in this respect.

5. When we adopted our WATS Order we purposely worded the issues in very broad terms. Clearly the scope of these issues is broad enough to include all aspects of the WATS rate schedules under investigation. Thus, without in any way expanding the scope of the investigation into the WATS rate schedules, the issues, as framed, subsume all of the questions raised in the aforementioned 1964 Decision in Docket No. 13914.

6. In addition, the Trial Staff states that its resources are insufficient to deal concurrently with both the existing Phase II issues as well as the new WATS issues, and it therefore requests that the WATS issues be pursued at a separate stage of the proceedings to commence at the conclusion of Phase II. AT&T agrees that the WATS issues could be considered outside of the Phase II proceedings, but suggests that this could "be accomplished much more expeditiously through the institution of a separate proceeding." We believe that it would be more conducive to the orderly progress of this proceeding if consideration of the WATS issues is deferred until the latter stage of the Phase II proceedings, rather than a separate proceeding. We will therefore grant the Trial Staff's request.

7. AT&T's Petition for Reconsideration requests that we delete that portion of our WATS Order in which we prohibit AT&T from making any change in the WATS tariff schedules during the pendency of this proceeding without prior approval of the Commission. AT&T has raised several grounds why it believes the prohibition is unlawful. The substance of its arguments has been heretofore considered and rejected by us when AT&T sought reconsideration of a similar provision in *Private Line Rate Case* Docket Nos. 18128 and 18684. For reasons stated by us at that time we reject AT&T's arguments herein.[7] However, for a different consideration, we shall, on our own motion, delete the provision to which AT&T objects. When we denied AT&T's request for deletion of a similar provision in Docket Nos. 18128 and 19684, we stated that:

> It should be emphasized that the investigation herein embraces among other things, an inquiry into the rate level relationships of the interstate services furnished by AT&T, *including MTS and WATS. Accordingly, it is entirely appropriate that paragraph 11 of the Order apply to these services.* (Emphasis supplied.)[8]

Thus it is clear that AT&T is already prohibited by an outstanding order of the Commission in Docket 18128/18684 from making changes in its WATS rate schedules without prior Commission approval, and it is unnecessary for us to impose a redundant prohibition on the same rate schedules in Docket 19129.

8. Accordingly, IT IS ORDERED, That the Petition filed by the Trial Staff, IS GRANTED.

9. IT IS FURTHER ORDERED, That the language in our Memorandum Opinion and Order of March 7, 1973 stating: "AT&T shall make no changes in the schedules herein suspended during the pend-

[7] 36 F.C.C. 2d 484 (1972).
[8] *Id.* at 489.

ency of this proceeding without prior approval of the Commission" IS DELETED; and that the Petition for Reconsideration filed by AT&T IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

STATEMENT OF COMMISSIONER RICHARD E. WILEY CONCURRING IN PART AND DISSENTING IN PART IN RE CHARGES FOR INTERSTATE TELEPHONE SERVICE, TRANSMITTAL NOS. 10989, 11027 AND 11657, DOCKET NO. 19129, IN WHICH CHAIRMAN BURCH JOINS

While I concur in the judgment of the majority that the WATS issues be investigated following the conclusion of Phase II, I dissent to that portion of our Memorandum Opinion and Order which requires that AT&T seek special permission before making any changes in its WATS tariff schedules during the pendency of this proceeding.

F.C.C. 73-829

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CABLECOM-GENERAL OF MODESTO, MODESTO, CALIF. For a Certificate of Compliance and a Construction Permit in the Cable Television Relay Service In Re Request for Order To Show Cause Directed Against CABLECOM-GENERAL OF MODESTO, MODESTO, CALIF.	CAC-213, CA019 CPCAR-360 SR-9709

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 9, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. Cablecom-General of Modesto, operator of an existing cable television system at Modesto, California, has filed an application for a certificate of compliance in order to add to its system carriage of the signals of KBHK-TV, San Francisco and KGSC-TV, San Jose (CAC-213). It has also filed an application in the Cable Television Relay Service (Part 78 of the Commission's Rules) for a microwave radio station to relay the signal of KGSC-TV to Modesto (CPCAR-360). Also pending is a petition for order to show cause filed by Great Western Broadcasting Corporation, licensee of Television Station KXTV, Sacramento, California (SR-9709). Cablecom-General has replied to this petition and Great Western has filed oppositions to grant of the requested certificate of compliance and Cable Television Relay station authorization. Kelly Broadcasting, licensee of Television Station KCRA, Sacramento, has filed separate statements supporting Great Western in its petition for a show cause order and in its opposition to grant of the certificate of compliance. All three items bear directly on the operation of Cablecom's cable television system in Modesto and will accordingly be considered together.

2. Cablecom-General now carries the following television signals:

KCRA-TV (NBC), Sacramento
KVIE (Educ.), Sacramento
KTXL (Ind.), Sacramento
KXTV (CBS), Sacramento
KOVR (ABC), Sacramento
KLOC-TV (Ind./Span. lang), Modesto
KTVU (Ind.), Oakland

The question posed by Great Western's petition for an order to show cause and one of the questions raised in its opposition to the certificate of compliance and microwave applications is whether the signal of KTVU, which has been carried since July, 1970, is being carried in violation of the Commission's rules. There appears to be no basic disagreement as to the facts involved. In January of 1969 Cablecom gave notice pursuant to Section 74.1105 of the Commission's then existing rules that it intended to commence carriage of the signals of five television stations from Sacramento and one station from Modesto. Great Western filed no opposition to this notice with the Commission, but did send a letter indicating that it would be opposed to the addition of any other signals if they were from outside the market. In July of 1970, Cablecom, without further notice to the Commission or to Great Western, commenced carriage of the signal of KTVU, an Oakland station placing a predicted Grade B signal contour wholly or partially over Modesto. The contested question is whether the addition of this signal was in violation of the rules because no Section 74.1105 notice of its proposed carriage was first given.

3. Great Western, citing a number of Commission decisions and proceedings,[1] contends that prior notice was necessary. Cablecom, citing the language of the rule itself, urges that such prior notice was not required, that carriage was lawfully taking place prior to March 31, 1972, and that such carriage is consequently now grandfathered pursuant to Section 76.65 of the rules. Although our decision below, denying in part Cablecom's request for two additional signals, appears to largely moot this issue, it nevertheless appears to require some answer. Section 74.1105 was the rule in force prior to March, 1972 governing the addition of Grade B signals to cable television systems. It stated in pertinent part: "No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station unless [appropriate advance notice to the Commission and local broadcasters had first been given]." Although the Commission proposed an amendment to this section of the rules in 1969 that would have required advance notice of the addition of Grade B signals to existing systems, the change was never adopted, and the proposal was subsequently superseded by the rules adopted in the *Cable Television Report and Order*.[2] The cases relied on by Great Western do not contradict the conclusion that no notice was required for the addition of Grade B signals to existing operations under the 1966 rules. In fact, the existence of the *Notice of Proposed Rulemaking* to change the rules tends to suggest that Cablecom's interpretation of the law rather than Great Western's is correct. Although the Commission did mention in adopting the 1966 rules that there might be cause for concern in some instances where Grade B signals were to be added, these cases, it was indicated, were to be considered on petition for special relief.[3]

[1] *Notice of Proposed Rulemaking in Docket 18,416*, FCC 69–9, — FCC 2d — (1969); *Midwest Television, Inc.*, FCC 68–662, 13 FCC 2d 478 (1968); *General Electric Cablevision Corp.*, FCC 68–545, 12 FCC 2d 889 (1968); *Memorandum Opinion and Order on Reconsideration of the Second Report and Order*, FCC 67–34, 6 FCC 2d 309 (para. 43) (1967); and *Second Report and Order in Docket 14,895*, 2 FCC 2d 725, 786–87 & n. 69 (1966).

[2] 36 FCC 2d 141 (1972).

[3] *Second Report and Order in Docket 14895*, 2 FCC 2d 725, n. 69 (1966).

Based on this history and on the language of the regulation itself, we accordingly conclude that carriage of KTVU was lawful when commenced and its continued carriage is authorized under Section 76.65 of the rules.[4] Great Western's 1969 letter raising concerns about the addition of out-of-market signals cannot, by itself, change the legal situation applicable to the addition of this signal. We will, accordingly, deny the Great Western petition for an order to show cause.

4. In response to the Cablecom certificate of compliance application, Great Western raised three other objections; that there has been no adequate explanation of Cablecom's plans to comply with the access requirements of the rules, that Cablecom has not indicated that it will comply with the nonduplication and program exclusivity requirements of the rules, and that the rules do not permit the addition of two further independent signals even if the signal of KTVU is considered grandfathered.

5. Concerning its compliance with the access requirements of the rules, Cablecom states:

> (a) the system is operating with a 12-channel capacity, and will be converted to a 20-channel capacity;
>
> (b) the system will provide bandwidth for non-broadcast uses equivalent to the bandwidth used for broadcast purposes;
>
> (c) the system will expand channel capacity as existing channel availability is exhausted, in compliance with the Commission's "N+1" availability concept;
>
> (d) the system will dedicate one free, non-commercial, public access channel available at all times on a first-come, first-served, non-discriminatory basis pursuant to the Commission's standards and to more detailed rules which will be adopted by the system;
>
> (e) the system will have available production facilities for public use in connection with the public access channel;
>
> (f) the system will allocate one channel each for local government and local educational use, available without charge during the first five years;
>
> (g) the system will offer all excess channel capacity for leased access services;
>
> (h) the system will have the capacity for two-way non-voice return communications;
>
> (i) the system will exercise no control over program content except to the extent necessary to insure compliance with operating rules described in Section 76.251(a)(11) of the Commission's Rules.

We find this recitation fully adequate to indicate Cablecom's compliance with the access requirements of the rules (Section 76.251).[5]

6. Great Western also argues that Cablecom should be required to indicate, in connection with its application, that it will provide network nonduplication and syndicated programming exclusivity to all stations entitled to such protection. Cablecom has agreed to abide by the rules in this respect, and we take this to mean that the protection will be provided. No further discussion of this point would therefore appear necessary.[6]

7. Finally, the point is made that even if the signal of KTVU is now being lawfully carried as a grandfathered signal under the rules, it

[4] See also *Television Signal Corporation*, FCC 73–582, — FCC 2d — (1973).

[5] Compare *Viking Media Corporation*, FCC 72–875, 37 FCC 2d 605 (1972); *Morgan County Tele-Cable, Inc.*, FCC 73–149, 39 FCC 2d 605 (1973); *General Electric Cablevision Corporation*, FCC 73–319, — FCC 2d — (1973).

[6] We note in addition that there is no requirement in the certificating process that cable systems affirmatively agree to comply with these provisions of the rules. *Paxton Community Antenna System, Inc.*, FCC 72–1168, 38 FCC 2d 904 (1972).

does not follow that the rules permit the further addition of two more distant signals. Modesto is one of the central cities in the 25th largest television market. If a system were commencing operation there pursuant to the March, 1972 cable television rules, there appears to be no question that it would, pursuant to Section 76.61 of the rules, be permitted to commence carriage of two independent television signals from outside of the market. The question is whether its existing carriage of KTVU should be counted as one of these two signals or whether it should be permitted two such signals in addition to KTVU. We hold, consistent with out prior decisions in similar situations,[7] that carriage of a grandfathered independent television signal not subject to the mandatory carriage requirements of the rules will be counted as one of the two distant signals authorized for carriage under Section 76.61 of the rules. In terms more appropriate to the proceeding at hand, Cablecom will not be permitted to continue carrying the signal of KTVU as well as add two additional signals. The signal of KTVU will be counted as one of the two additional signals and carriage of only one further distant independent signal certified.

8. Accordingly, having fully reviewed the Cablecom certificate of compliance application, we conclude that the service proposed is consistent with the rules and that a grant is in the public interest only with respect to one of the two additional signals proposed. A certificate of compliance will be issued when Cablecom-General advises the Commission as to which of the signals it chooses to carry. In light of the foregoing, there exists a possibility that Cablecom will choose the signal of KBHK, and not KGSC, thereby obviating the necessity for authority in the Cable Television Relay Service. We will therefore neither grant nor deny CPCAR–360, but direct the Chief, Cable Television Bureau to grant that application on receipt of notice from Cablecom-General that there continues to be a need for the station authorization requested.

Accordingly, IT IS ORDERED, That the "Petition for Order to Show Cause" filed September 9, 1970, by Great Western Broadcasting Corporation (SR–9709) IS DENIED.

IT IS FURTHER ORDERED, That the "Application for Certification" filed April 20, 1972, by Cablecom-General of Modesto IS GRANTED to the extent indicated herein and is otherwise DENIED.

IT IS FURTHER ORDERED, That the Chief, Cable Television Bureau IS DIRECTED to act on Cablecom-General's Application CPCAR–360 consistent with paragraph 8 of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, Acting Secretary.

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[7] *Cable TV Company of York*, FCC 73–459, 40 FCC 2d 927 (1973); *Sammons Communications, Inc.*, FCC 73–634, — FCC 2d — (1973).

F.C.C. 73-614

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CABLE TV OF MINOT, MINOT, N. DAK. For Certificate of Compliance	CAC-443 ND009

MEMORANDUM OPINION AND ORDER

(Adopted June 6, 1973; Released August 9, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONERS JOHNSON, H. REX LEE, WILEY AND HOOKS CONCURRING IN THE RESULT.

1. On May 24, 1972, Cable TV of Minot filed an "Application for Certificate of Compliance" (CAC-443) in which it proposes to operate a new cable television system at Minot, North Dakota, which is in a smaller television market. Public notice of this application was given June 12, 1972. The application was amended on October 2, 1972, and again on October 12, 1972, when Cable TV also requested a waiver of Section 76.59(b)(1) of the Commission's Rules.[1] On November 24, 1972, Spokane Television, Inc., licensee of Station KTHI-TV (ABC), Fargo, North Dakota, filed a "Petition to Dismiss or Deny" directed against the amended application, and on February 21, 1973, Cable TV filed further information at the Commission's request.

2. Cable TV proposes to carry only four television signals on its system: KMOT (NBC) and KXMC-TV (ABC, CBS), both Minot, North Dakota; WTCN-TV (Ind.), Minneapolis, Minnesota; and KORN-TV (ABC), Mitchell, South Dakota. Waiver of Section 76.59(b)(1) of the Rules is requested in order to allow the leapfrogging of ABC affiliates KTHI-TV and KCND-TV, Pembina, North Dakota.[2] In support of its waiver request, Cable TV argues that KORN-TV's signal is available in Aberdeen, South Dakota, which is approximately 235 miles from Minot; that Mountain Microwave Corporation has pending applications (File Nos. 4428-4434-C-1-72) to establish a common carrier microwave relay system between Minot and Aberdeen; and that use of this system to obtain the signals of KORN-TV and WTCN-TV would allow service in Minot most expeditiously. *Inter alia*, we note that no comparable microwave system is proposed which would be available between Minot and

[1] Section 76.59(b)(1) of the Rules provides that,

Full network stations. A cable television system may carry the nearest missing full network stations or the nearest in-state full network stations;

NOTE: The Commission may waive the requirements of this subparagraph for good cause shown in a petition filed pursuant to § 76.7.

[2] Minot is approximately 180 miles from Pembina; 230 miles from Fargo; and 350 miles from Mitchell. We note that Cable TV has raised serious doubt whether KCND-TV is presently an ABC affiliate within the meaning of our cable television rules; however, as explained in paragraph 3, this is not the basis for our decision in this case.

Pembina. Spokane Television opposes grant of the waiver "in place of the closer, in-state and full network signal of KTHI–TV."

3. The only issue is whether the availability of microwave service from Aberdeen justifies the requested waiver in this case. Our general policy in this area is stated in par. 25, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 336, as follows:

> "We do not intend to return to the process whereby waiver is requested in case after case because of microwave savings; to do so would undermine the leapfrogging rule. But we are not unmindful of the need for relief in unusual circumstances. *Sun Cable T–V*, 27 FCC 2d 261 (1971), and will respond accordingly. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192."

In this case, we find unusual circumstances exist since Station KXMC–TV is also affiliated with ABC and will be entitled to claim network exclusivity (pursuant to Section 76.91 of the Rules) against a significant portion of any imported ABC programming on the Minot cable system. Since Cable TV will, therefore, be importing less than a full signal of programs, the importance of saving microwave costs is magnified beyond that contemplated in *Reconsideration*, *id.* At our request, Cable TV submitted a rate analysis of the various options for microwave service. Cable TV's uncontroverted conclusion is that it present proposal would cost approximately $75,000 less to implement than would the next cheapest alternative.[3] In these circumstances, we will grant the requested waiver. Finally, we note *sua sponte* that Cable TV's franchise [4] is not fully consistent with Section 76.31 of the Rules (for example, it specifies a 5% franchise fee without the showing required by Section 76.31(b) of the Rules). Nonetheless, our review of the franchise and Cable TV's additional commitments satisfies us that it is in substantial compliance with our rules sufficient to justify a grant until March 31, 1977. E.g., *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10, *reconsideration denied* FCC 73–293, — FCC 2d —.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition to Dismiss or Deny" filed November 24, 1972, by Spokane Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Section 76.59(b)(1) of the Commission's Rules IS WAIVED, that Cable TV of Minot's application (CAC–443) IS GRANTED, and that an appropriate certficate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[3] We note Spokane's argument that Cable TV and Mountain Microwave have common ownership, so that Cable TV's argument based on the cost or availability of microwave service is weakened. We have attempted independently to determine the reasonableness of the cost estimates and do not find them so unreasonable as to warrant further investigation. In this regard, we note that Spokane did not challenge their specific accuracy. Further, there does not appear to be any plausible motive—other than cost savings—for carrying KORN–TV rather than KTHI–TV or KCND–TV.

[4] The Minot franchise was granted June 8, 1971.

F.C.C. 73-711

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CALIFORNIA WATER & TELEPHONE CO. Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2 Applicable to Channel Service for Use by Community Antenna Television Systems	Docket No. 16928
THE ASSOCIATED BELL SYSTEM COMPANIES Tariffs for Channel Service for Use by Community Antenna Television Systems	Docket No. 16943
THE GENERAL TELEPHONE SYSTEM AND UNITED UTILITIES, INC. COMPANIES Tariffs for Channel Service for Use by Community Antenna Television Systems	Docket No. 17098

ORDER

(Adopted June 28, 1973; Released July 2, 1973)

BY THE COMMISSION:

1. By our Memorandum Opinion and Order, FCC 73-541, released May 23, 1973, we ordered that oral argument would be held on July 24, 1973 on the issue of whether the Commission has jurisdiction over the agreements or arrangements of telephone companies, electric utilities, and others with respect to pole line attachment of conduit agreements or arrangements with CATV operators beyond that exercised in our decision in Docket 18509 and, if so, the extent and nature of such jurisdiction and what action, if any, we should take with respect thereto. We further ordered that each participant in the oral argument must file a brief directed to this issue on or before July 2, 1973. Our order further provided for the filing of replies on or before July 16, 1973.

2. Now before us is a motion filed on June 26, 1973 by the National Cable Television Association, Inc. (NCTA) requesting that the time for filing briefs and comments be extended from July 2, 1973 until July 6, 1973. NCTA states that counsel for the Associated Bell System Companies, the General Telephone System, United Utilities, Inc., Utilities Telecommunications Council, and the California Community Television Association have stated that they would have no objection to such extension if applicable to all parties to this proceeding.

3. In view of the foregoing, we will grant the relief requested. Furthermore, since we previously have provided for a two-week period for the filing of replies and believe that such replies will materially

aid our resolution of the issues in this proceeding, we will on our own motion extend the date for filing replies for approximately the same period.

Accordingly, IT IS ORDERED, That the time for filing briefs or other written comments, and for filing replies herein IS EXTENDED to July 6, 1973 and to July 18, 1973, respectively.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-791

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REFERRAL OF CHASTAIN ET AL. V. AT&T FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA	Docket No. 19793

ORDER

(Adopted July 26, 1973; Released August 2, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. We have before us a Memorandum-Order of the Honorable Oliver Gasch, Judge, United States District Court for the District of Columbia, in the case of *Paul Y. Chastain and Patsy P. Chastain, et. al. v. American Telephone and Telegraph Company*, dated December 18, 1972. This matter was instituted as an antitrust complaint for treble damages and injunctive relief filed with the Court on July 13, 1970. Petitioners, who are fifteen individuals or business organizations, alleged therein that the American Telephone and Telegraph Company (AT&T, sometimes referred to as the Bell System operating companies) acted unreasonably in refusing to provide mobile telephone service to users of a portable manual mobile telephone device, known as the Attache Phone, between 1968 and the time that the complaint was filed. The Memorandum-Order requests the Commission to determine the justness, reasonableness, validity and effect of this policy and practice under the Communications Act of 1934, as amended. We have also received a Petition for Oral Argument and Prompt Action filed by Petitioners on March 23, 1973; a Response filed April 5, 1973 by AT&T; and a Reply to AT&T's Response filed by Petitioners on April 19, 1973. In addition to the pleadings filed with us, we are considering certain documents filed with the Court, including Plaintiff's memorandum in support of its motion for summary judgment; a number of affidavits in support of Petitioners' position; Defendant's memorandum in opposition to the motion for summary judgment; affidavits of certain individuals in support of AT&T's position, particularly those of A. A. Bottani, Jr., and Richard T. Duggan; Plaintiff's reply to the memorandum in opposition to the motion for summary judgment; and a stipulation signed by the attorneys for the parties.

2. During the period of time covered by the complaint, Petitioners had been engaged in the selling or distributing of the Attache Phone. In their petition filed with us, they requested that we determine AT&T's practices with respect to the Attache Phone unreasonable between 1968 and the time that the antitrust complaint was filed with the Court, that the policy was without any sound basis in terms of pro-

tection of the company's facilities, and that further there is nothing in communications law or policy to bar the Court from proceeding on their motion for summary judgment. AT&T argued in its response that its refusal to allow Attache Phone operation in certain areas was, and is, justified, since its general use in those areas would be detrimental to many of its customers.

3. For the reasons stated below, we find that there are questions whether AT&T's exclusionary policy with respect to Petitioners' Attache Phone during the period of time in issue, may have been unreasonable and therefore in violation of Sections 201(a) and 202(a) of the Act (47 U.S.C. 201(a), 202(a)); whether the company may have violated Section 214(a) of the Act (47 U.S.C. 214(a)) by discontinuing service without first receiving authority from the Commission to do so; and whether the company has been in continuous violation of its tariff obligation under Section 203(c) of the Act (47 U.S.C. 203(c)). We have decided, therefore, to hold oral argument on these questions, as amplified below.

NATURE OF THE SERVICE [1]

4. The Attache Phone is a portable, manually operated mobile telephone contained in an attache case and designed for use in mobile telephone systems such as that provided by the Bell System operating companies. Unlike a vehicular mobile telephone, the Attache Phone is not installed for use in an automobile or truck. Consequently its owner is not limited to placing or receiving calls while in a vehicle, but may instead utilize the device from any physical location where he is able to obtain mobile telephone service.

5. An Attache Phone user places a call by first manually locating an idle channel, a process which requires selection by listening to see whether an available channel is free. When an idle channel is located, a mobile operator must intervene to connect him to the desired number. Incoming calls must also go through a mobile operator, who signals the unit and connects the call by utilizing an idle channel. The need for operator assistance characterizes the Attache Phone as a manual mobile telephone as opposed to one equipped with automatic, direct dial capability.

6. Automatic dial service is a distinguishing feature of Improved Mobile Telephone Service (IMTS), the system which AT&T has increasingly implemented within the last ten years. Under most circumstances, customers equipped with automatic, IMTS mobile telephones have no need for operator assistance. In addition, idle channels over which to place a call are selected automatically without having to first manually monitor all available channels in order to locate one which is not in use. As a result, calls are initiated and received in much the same way as the modern landline telephone.

7. Mobile telephone service originated in the mid-1940's on a manual basis, but like the transformation which affected the manual landline telephone, the introduction of advanced technology has produced many mobile telephone systems that are fully automatic. By 1971, 43

[1] The description is based in part upon the contents of documents filed with both the Court and the Commission.

per cent of the mobile telephones registered with Bell System operating companies were equipped for automatic dial service (See Dugan affidavit, paras. 6, 9). This is a significant statistic since IMTS is of relatively recent vintage, the first proposal for an automatic mobile telephone system having been granted by the Commission in 1957. In 1962, the Bell Telephone Company of Pennsylvania was granted authority for a developmental station at Harrisburg. The company's proposal outlined the design of what was referred to as Improved Mobile Telephone Service, and the system described in its 1962 application is, for the most part, identical to present IMTS operations. Since its introduction, the Commission has been aware of the growing trend of telephone companies to convert to IMTS; and moreover we believe that this trend is in keeping with the public interest.

8. Part 21 of the Commission's Rules and Regulations (47 CFR, 21.14(b)), provides for licensing of mobile telephones under a blanket authorization of a carrier or individually to a mobile subscriber. A customer who wishes to utilize equipment provided by a Bell System operating company will be licensed under the specific company's blanket authorization. In such a case, the customer pays a monthly rate which includes the cost of service and the cost of using the equipment for mobile telephone exchange service.[2]

9. If instead, the customer desires to furnish his own equipment, he may obtain either manual or IMTS units from numerous suppliers located throughout the country. However, by utilizing other equipment than that provided by AT&T, he is not permitted to operate under the company's blanket authorization, and must apply individually to the Commission for a license. To be so licensed, the applicant must demonstrate that he has made appropriate arrangements with a carrier for the service requested (See 47 CFR 21.15(i)). He may achieve this by including within the application a "letter of intent" to provide the service within a specified service area, signed by an authorized official of the carrier.

10. This does not mean that a subscriber can receive service only in the area designated by the letter of intent. When the customer leaves his base station of registry, he may nevertheless qualify for service as a "roamer." Roamers are mobile telephone users who, although registered in one area, are temporarily in range of a "foreign" base station. In rendering service to roamers equipped with IMTS units, a foreign IMTS base station will complete calls manually with the assistance of a mobile operator.

11. In IMTS areas, the Bell System operating companies will provide only IMTS mobile telephones. These units are not manufactured by AT&T or any of its subsidiaries, but by such companies as Motorola and General Electric. Letters of intent will be issued to customers who propose the use of their own units only if those units are IMTS. The AT&T policy has been to refuse letters of intent to potential customers who, seeking service in IMTS areas, propose the use of manual equipment like the Attache Phone. However, in those areas not yet converted to IMTS, letters of intent will be provided for customer owner manual mobile telephones.

[2] This charge, as well as the regulations governing the exchange use of the service are filed with state or local regulatory authorities (See 47 U.S.C. 152(b), 221(b)).

REFERRAL TO THE COMMISSION

12. In its memorandum in support of its motion for summary judgment filed with the Court, Petitioners claimed that AT&T's refusal to provide letters of intent to Attache Phone users prevented competition in the mobile telephone market and constituted a group boycott and concerted refusal to provide mobile telephone service in violation of the antitrust laws.

13. AT&T argued in its opposition to the motion that there were issues of material fact which precluded disposition of the matter on summary judgment. It contended that its practices were reasonable and justified since, in its opinion, general use of the Attache Phone would have resulted in less efficient use of frequency spectrum, interfered with the maintenance of quality service for its IMTS customers, impeded privacy in communications, imposed burdens on operators and associated costs, and interfered with automatic channel selection.

14. The Court's Memorandum–Order invoked the doctrine of primary jurisdiction, citing *Carter* v. *AT&T*, 250 F. Supp. 188 (N.D. Texas, 1966); affd. 365 F. 2d 486 (5th Cir., 1966). Accordingly the matter was referred to the Commission for an administrative determination of those issues relating to the justness, reasonableness, validity, and effect of the complained of policy.

15. No correspondence was received from Petitioners, and consequently by letter of March 2, 1973, the Commission requested Petitioners to file a complaint if they wished to pursue the charges outlined in the Court's Memorandum–Order. A Petition for Oral Argument and Prompt Action was filed March 23, 1973, and Petitioners stated therein that when AT&T implemented its IMTS system in 1963, it insisted upon dial vehicular equipment despite the fact that it had had no experience with the effect of manual mobile equipment operating through IMTS base stations. It was alleged that a blanket prohibition of customer owned manual equipment from IMTS areas, without regard to the prospect of harm, was an unreasonable practice. Petitioners further maintained that the Attache Phone was, in fact, compatible with IMTS.

16. AT&T responded by asserting that there was a sound basis for excluding the Attache Phone from IMTS areas, and that the petition contained factual allegations which were contradicted by AT&T's affidavits. For this reason, an evidentiary hearing was requested. At the same time, AT&T further stated that if no hearing were deemed necessary by the Commission, then an oral argument was acceptable, provided that Petitioners had asked for one on the assumption that their arguments must prevail notwithstanding AT&T's factual allegations. In any case, the company asserted that its participation in a Commission proceeding was without prejudice to its expressed position that the policy in issue is a matter of state regulatory authority, and therefore not subject to Commission jurisdiction or to attack under the antitrust laws.

17. Petitioners' reply disputed AT&T's position on jurisdiction. They claimed that the Bell System operating companies provided interstate service to mobile telephone subscribers, and offered their own

affidavits which stated that the Attache Phone had been designed, at least in part, for interstate communication. Petitioners further maintained that no issues of fact were in contention that would require a hearing since they were prepared to accept AT&T's testimonial facts, although not the arguments by which ultimate conclusions were derived from testimonial facts.

COMMISSION JURISDICTION

18. We reject AT&T's contention that the Commission does not possess the jurisdictional authority to deal with this matter pursuant to the Act. AT&T argues that under Section 221(b) of the Act (47 U.S.C. 221(b)), the Commission has not been granted jurisdiction over the policy and practice in issue. It cites, in addition, a Public Notice of 1965 by which it claims the Commission affirmed its belief that it did not possess jurisdiction over mobile telephone service, *Public Notice*, 1 FCC 2d 830 (1965). Section 221(b) reads as follows:

> Subject to the provisions of Section 301, nothing in this act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with, wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State Commission or by local governmental authority.

19. AT&T has misconstrued Section 221(b), for that section denies us jurisdiction over exchange service in cases where mobile service areas cross a state border, as it does in metropolitan Washington, D.C. To say that the Commission has no jurisdiction over local mobile telephone exchange service, is not to say that the Commission has no jurisdiction over mobile telephone service at all. The user of a mobile telephone is not only offered exchange service through AT&T's tariffs filed with the state regulatory agencies, but is offered interstate toll service pursuant to AT&T's Tariff FCC No. 263 (See Sections 1.1; 3.4 of Tariff). By filing this tariff, AT&T must be held to concede that part of the use of mobile telephone service is subject to our jurisdiction under Title II of the Act. According to Petitioners' affidavits, the Attache Phone was designed to be used for interstate communication as well as for local exchange service (See Rosenberg affidavit, paras. 3–7; Hennings affidavit, paras. 1–4). Thus, we must conclude that we have jurisdiction over interstate, non-exchange calls placed by users of mobile telephones under Title II of the Act, and that we may therefore proceed with this matter in accordance with the Court's request and pursuant to our own statutory authority.

20. AT&T's reference to the 1965 Public Notice lends no support to its argument, for that document was concerned with miscellaneous common carriers providing mobile telephone service. Moreover, the Public Notice goes on to assert that the Commission does have jurisdiction with respect to any interstate toll calls transmitted through interconnection of a mobile system with the telephone network.

COMMISSION PROCEDURE

21. The Court has charged the Commission with the duty of determining the reasonableness and effect of AT&T's exclusionary policy with regard to Petitioners, while leaving to the Commission's discretion the scope of the administrative examination and the factors to be considered. We feel that an evidentiary hearing is not warranted. We have been presented with the memoranda in support of, and in opposition to summary judgment, affidavits of both parties, a number of relevant documents, the pleadings specifically filed with us, and a stipulation that it is the general practice and policy of the Bell System operating companies to refuse letters of intent for manual mobile telephones like the Attache Phone when the requested service will be rendered through an IMTS base station (See Stipulation, para. 4). In addition, for the purpose of reaching our conclusions, we are accepting as true all testimonial facts offered by AT&T. However, before reaching legal conclusions on these facts, we first wish to hear oral argument from the parties.

22. Thereafter, it is our intention to advise the Court of the reasonableness, pursuant to Sections 201(a) and 202(a) of the Act, of AT&T's refusal to register Attache Phones in IMTS areas during the period of time covered in the complaint. We further wish to advise the Court on a possible violation of Section 214(a) of the Act, and on certain tariff matters not certified to us, and which are governed by Section 203 of the Act. We believe that proceeding in this manner will satisfy the mandate of the Court, and subsequently place it in a position to rule on the antitrust questions pending before it.

QUESTIONS GOING TO THE REASONABLENESS OF AT&T'S POLICY ON ATTACHE PHONES

23. We believe that questions are raised as to whether AT&T's policy with regard to Petitioners' customers in IMTS areas has violated Sections 201(a) and 202(a) of the Act, during the period of time between 1968 and the filing of the antitrust complaint.

24. The purpose of mobile telephone service is primarily to afford the public an efficient way in which to engage in two-way voice communication apart from, but in conjunction with,[3] a landline telephone installation. Mobile telephone service is offered by both landline telephone companies and miscellaneous common carriers (also known as radio common carriers). The latter category is comprised of more than 600 independent communications operations, many of them physically interconnected with landline telephone companies.

25. Manual systems and IMTS systems are the two general classifications of mobile telephone service, and in order to examine the question of AT&T's reasonableness with regard to Petitioners, it is necessary to assess the mobile telephone market during the years covered by the complaint. In the areas designated for transition to IMTS, AT&T gave what it considered to be reasonable notice of the need to convert to automatic equipment. Accordingly, vehicular manual mobile telephone customers in these areas were obliged to change their equipment

[3] Mobile-to-mobile service is included within Tariff FCC No. 263, 1.1.

to vehicular IMTS units. This may have caused some inconvenience, but it is important to note that suitable vehicular equipment was readily available from those sources previously mentioned, i.e., Bell System operating companies or independent equipment suppliers.

26. However, it appears that the same may not be true for users or potential users of portable, non-vehicular mobile telephones. In 1968, there were only manual portables available on the market, and not until June 3, 1971 was a portable IMTS mobile telephone type accepted by the Commission. As a result, the effect of excluding portable manual telephones like the Attache Phone appears to have been to preclude the use of all portable mobile telephones in IMTS areas, regardless of channel congestion in individual IMTS areas, or of the availability of suitable portable units.

27. The primary factors cited by AT&T in defense of its policy include the ability to provide a better grade of service, or service to an increased number of users, or both, where IMTS service is provided and manual mobile telephones are not registered; the enhanced privacy that results from the use of IMTS service in the absence of manual mobile telephones; the more efficient use of scarce spectrum space that is a consequence of this pattern; the danger manual mobile telephones pose in IMTS areas because of their ability to "seize" channels to the detriment of users of dial mobile telephones; and the adverse impact of manual mobile telephones, which lack automatic channel selection, on the use of the mobile telephone network as a two-way communication service (See AT&T Response, para. 17).

28. Petitioner argues that these factors were not of the same magnitude in all IMTS areas principally because circumstances such as channel congestion can vary from area to area (See Reply to AT&T's Response, paras. 18, 19, 24, and 28). AT&T admits that each of the factors listed above does vary in seriousness according to the area, but emphasized that the registration of manual mobile telephones produces disadvantages in virtually every IMTS area (See AT&T Response, para. 17; Dugan affidavit, paras. 16–25; Bottani affidavit, paras. 14–35).

29. Section 201(a) of the Act provides:

> It shall be the duty of every common carrier engaged in interstate or foreign communications by wire or radio to furnish such communication upon reasonable request therefor. . . .

30. The exclusion from registry of the Attache Phone at a time when technological advancement had not yet developed portable IMTS mobile telephones presents questions of whether the carrier has complied with Section 201(a). We have a situation in which it appears that a policy of complete denial from registry had been instituted on the basis that inclusion of the Attache Phone would have harmed the IMTS system, and yet AT&T has admitted that any adverse impact will differ according to the particular area under consideration. Moreover, it appears AT&T has devised no rational standards by which to deal with the Attache Phone even though the effects of its use differed in varying IMTS areas. Under such circumstances, it is questionable whether denial of all requests for service made by users of the Attache Phone is reasonable. Such a blanket prohibition may not be justifiable under Section 201(a), the *Carterphone* decision, 13 FCC 2d 420

(1968),[4] or the decision in *Hush-A-Phone* v. *U.S.*, 99 U.S. App. D.C. 190, 238 F. 2d 266 (D.C. Cir., 1956),[5] in the absence of a showing that Attache Phone users could not have been accommodated in any IMTS area without an unacceptable impact on IMTS efficiency. We are not suggesting that exclusion of the Attache Phone would have been improper under all circumstances. It does not appear, however, that AT&T made an attempt to define those circumstances wherein prohibition from registry would have been reasonably appropriate. A blanket prohibition so broad that it failed to consider diverse factors in varying IMTS areas, raises a question of whether there was an unreasonable denial of service upon reasonable request.

31. There is nothing in the record before us to show that AT&T conducted any surveys or technical studies in order to distinguish the difference in the impact of Attache Phones in those IMTS areas with heavy subscriber congestion or an abundance of roamers, and in those areas where problems of congestion were less severe. We note that AT&T admits serving IMTS roamers manually in foreign IMTS areas (See Bottani affidavit, para. 12). From this, it appears that mobile operators were necessary in order to provide roamer service, and that manual units were capable of being accommodated, for IMTS roamers could have access to the mobile telephone system only if they operated in the manual mode. We have previously held that the telephone company could set up reasonable standards by which to deal with communications devices, *Carterphone*, 13 FCC 2d 420, 424 (1968); however, AT&T has, thus far, made no showing that any thought was given by the company to the development of appropriate standards which might have been applied to Petitioners' customers. Instead these customers appear to have been, apparently, completely refused registration without regard to the conditions that existed at the time in specific IMTS areas, and despite the fact that the Attache Phone might have been accommodated in any IMTS area that provided service to roamers.

32. Section 202(a) of the Act reads as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by means or device, or to make or give any undue or

[4] *Carterphone* had similarly begun as an antitrust action, brought by the inventor of a device which permitted a person receiving an incoming landline telephone call to transmit such call from the location received to another location by use of two-way radio communication. AT&T's tariff had provided that no apparatus not furnished by the company could be attached to its facilities. The hearing examiner found that the device did not adversely affect the telephone system, and that the tariff to prohibit attachment was prospectively unreasonable since it did not take into consideration whether or not the device would cause harm, *Carterphone*, 13 FCC 2d 430 (1967). In reviewing the decision, the Commission found the tariff to be in violation of Sections 201(b) and 202(a) of the Act, but further stated that it was not finding that the telephone company may not prevent the use of devices which do cause harm. *Carterphone*, 13 FCC 2d 420, 424 (1968).

[5] *Hush-A-Phone* involved the acceptability of a cup-like device mechanically fastened to the mouthpiece of a telephone handset. The Court held that a tariff prohibition of a customer supplied foreign attachment interfered with the telephone subscriber's right reasonably to use his telephone in ways which were privately beneficial without being publicly detrimental. After *Hush-A-Phone*, the Commission directed AT&T to rescind any tariff regulations that prohibited a customer from using, in connection with interstate or foreign service, any device which did not injure its employees, its facilities, the public in its use of those facilities, or impair the operation of the telephone system, *Hush-A-Phone* v. *AT&T*, 22 FCC 112 (1957).

unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

33. The exclusion of Attache Phones at a time when IMTS portable equipment was unavailable, presents the question of whether AT&T may have subjected Petitioners to an undue and unreasonable prejudice in derogation of Section 202(a). Although use of the Attache Phone might not have had a significantly deleterious effect on IMTS areas without heavy subscriber congestion, it appears that the refusal to register was absolute. If AT&T excluded the device from an entire mobile telephone market without a proper technological basis, Petitioners and their customers could have been unreasonably prejudiced and disadvantaged in violation of Section 202(a).

34. For the foregoing reasons, we believe that substantial questions are raised, which we do not now resolve, as to past violations of Sections 201(a) and 202(a) of the Act. We recognize that recently there has been a significant change in market conditions regarding mobile telephones, i.e., portable IMTS units are now available. While we do not find at this time sufficient reason to institute a proceeding on our own motion as to the present propriety of AT&T's policy, we do not exclude the possibility of a properly supported complaint filed pursuant to Section 208 of the Act (47 U.S.C. 208) which might allege facts sufficient to raise questions of present reasonableness with respect to AT&T's actions.

REQUIREMENTS OF SECTION 214(a) OF THE ACT

35. Section 214(a) of the Act provides:

> . . . No carrier shall discontinue, reduce, or impair service to a community, or part of a community unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby. . . . Provided, however, that nothing in this section shall be construed to require a certificate or other authorization from the Commission for. . . . changes in plant, operation or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

36. When AT&T implemented its stated policy that manual mobile telephones would not be registered in IMTS areas, it did so without first obtaining authority from the Commission to discontinue the service. This omission may have adversely affected users and potential users of the Attache Phone.

37. Section 63.60 of the Commission's Rules and Regulations gives certain examples of discontinuance, reduction, or impairment of service, (47 CFR: 63.60). Among such examples are:

> a. the closure by a carrier of a public telegraph office, a telephone exchange rendering interstate or foreign telephone toll service, a public toll station serving a community or part of a community. . . . (63.60(a)(1));
>
> b. the reduction in hours of service by a carrier at a public telegraph office, at a telephone exchange rendering interstate or foreign telephone toll service, at any public toll station. . . ., or at a public coast station (63.60(a)(2));
>
> c. the termination or suspension by a carrier of pickup and delivery service in connection with message telegraph service to any community or part of a community. . . . or the substitution of a delivery agency for the han-

> dling of messages in lieu of direct handling by a telegraph office (63.60(a)(3));
>
> d. the dismantling or removal from service of any trunk line by a carrier which has the effect of impairing the adequacy or quality of service rendered to any community or part of a community (63.60(a)(4));
>
> e. the severance by a carrier of physical connection with another carrier. . . . or the termination or suspension of the interchange of traffic with such other carrier (63.60(a)(5)).

38. The foregoing examples are not exclusive, and we find that the discontinuance from registry of manual mobile telephone service in IMTS areas may have been a discontinuance under Section 214(a) of the Act. Manual mobile telephone service was offered to registered subscribers in each of the IMTS area communities in issue. When registry ceased to become possible, this service was discontinued on a regular basis without the procedures required by Section 214(a).

39. In these circumstances, we think that substantial question is raised as to whether there has been a violation of Section 214(a).

REQUIREMENTS OF SECTION 203 OF THE ACT

40. AT&T's Tariff FCC No. 263 applies to long distance message telecommunications service offered by the company. It appears that AT&T did not set forth in its tariffs the exclusion of manual mobile telephones from registry in certain areas. Section 203(c) of the Act provides:

> . . . No carrier shall. . . . (3) employ or enforce any practices affecting such charges [for interstate communications] except as specified in such schedule.

41. From February 1, 1968, to the present time, the only interstate tariff limitations on service to vehicles in AT&T's tariff offering are:

> Public Land Mobile Service is available to vehicles equipped for this service when within range of a Base Station through which such service is furnished.[6] Service is subject to transmission, atmospheric and like limitations (See Attachment, Tariff FCC No 263, Section 3.4.1(a)(2)).

42. The tariff sections relating to mobile telephone service cite no other limitations, and we see nothing within the tariff which might be reasonably construed to limit service only to automatic dial equipped mobile telephone equipment.

43. For the foregoing reasons, we think questions are raised as to whether AT&T has been in continuing violation of Section 203(c).

44. In view of the foregoing questions, we find that oral argument should be held upon the issues below.

45. We request that 10 days prior to oral argument, AT&T supply us with facts as to whether, or to what extent, if any, the exclusion of the Attache Phone from IMTS areas was based upon technical surveys or any other studies carried out before the policy decision to exclude Attache Phone from registry was implemented. Moreover, if surveys or studies were made, we request that AT&T provide independent results from each separate area where such surveys, etc., were con-

[6] Stations other than vehicles which are authorized by the Federal Communications Commission to communicate with a Base Station are considered as vehicles (See Attachment, Tariff FCC No. 263, Section 3.4.1(a)(2)).

ducted. AT&T should also list those areas which converted to IMTS in which no surveys, etc., were made prior to conversion.

46. Accordingly, oral argument WILL BE HELD on the following issues:

(a) To determine whether or not AT&T failed to furnish communication service to persons wishing to use Attache Phones upon reasonable request therefor in violation of 201(a) of the Act.

(b) To determine whether or not AT&T unjustly or unreasonably discriminated against persons wishing to use Attache Phones in the practices and regulations pursued by the company in violation of Section 202(a) of the Act.

(c) To determine whether or not AT&T was in violation of Section 214(a) of the Act for failing to apply to the Commission for certification to discontinue mobile telephone service to persons wishing to use Attache Phones in IMTS areas on a registered basis.

(d) To determine whether or not AT&T is in violation of Section 203(c) of the Act for failing to include within FCC Tariff No. 263 the provision that manual service is not rendered to manual mobile telephone users on a registered basis in IMTS areas.

47. IT IS ORDERED (a) That oral argument will be held before the Commission *en banc* at 9:30 a.m. on September 24, 1973, (b) That the parties here designated ARE AUTHORIZED to present oral argument in the following order for the times designated:

Chastain, et al	30 minutes
AT&T	30 minutes

and (c) That Chastain, et al. MAY RESERVE part of their time for rebuttal.

48. IT IS FURTHER ORDERED, That the Petition for Oral Argument and Prompt Action filed March 23, 1973, by Petitioners IS GRANTED, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-814

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), NEW YORK, N.Y.	Docket No. 11227 File No. BSSA-266
For Special Service Authorization To Operate Additional Hours From 6 a.m. (e.s.t.) to Sunrise, New York, N.Y., and From Sunset, Minneapolis, Minn.	
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), NEW YORK, N.Y.	Docket No. 17588 File No. BP-16148
MIDWEST RADIO-TELEVISION, INC. (WCCO), MINNEAPOLIS, MINN.	Docket No. 19403 File No. BP-19151
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 7, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT.

1. Before the Commission for consideration is a request filed on July 23, 1973, by City of New York Municipal Broadcasting System (WNYC) for a stay of the effectiveness of a Review Board Memorandum Opinion and Order, FCC 73R-247, released July 9, 1973. In the Review Board order the issues were enlarged for the purpose of determining whether the site where WNYC proposes to relocate its tower is presently available and whether WNYC kept the Commission fully informed of changes affecting its application as required by Section 1.65 of the Commission's Rules.

2. WNYC has applied for review of the Review Board's ruling and it seeks to have the hearing on the added issues stayed pending the disposition of its application for review. The request for stay is opposed by the Broadcast Bureau and by Midwest Radio-Television, Inc. (WCCO).

3. In order to obtain a stay, WNYC must demonstrate that there is a reasonable likelihood of success on the merits of its application for review and that it will suffer irreparable injury or the public interest will be adversely affected unless a stay is granted. *Pacifica Foundation et al.*, 24 FCC 2d 816 (1970); *Waterman Broadcasting Corp. et al.*, 12 FCC 2d 300 (1968). Since we have not yet had an opportunity to study the application for review, we express no opinion with respect to the merits thereof. Nevertheless, we note in this connection that in order to obtain review of the Review Board's interlocutory ruling at this stage of the proceeding, WNYC faces the heavy burden of showing that the ruling is a fundamental one which affects the conduct of the entire proceeding and that the enlargement of issues constituted an

abuse of discretion or was clearly unauthorized action. See Note to Section 1.115(e)(2) of the Rules; *Home Service Broadcasting Corp. et al.*, 25 FCC 2d 759 (1970).

4. In our view, WNYC's stay request must be denied because of the failure to show the requisite irreparable injury to the applicant or to the public. At most it appears that WNYC may be inconvenienced by a denial of a stay pending disposition of its application for review and more is required to warrant a grant of the extraordinary relief which it requests.

5. ACCORDINGLY, IT IS ORDERED That the request for a stay filed on July 23, 1973, by City of New York Municipal Broadcasting System (WNYC) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R-285

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
COWLES FLORIDA BROADCASTING, INC. (WESH-TV), DAYTONA BEACH, FLA. For Renewal of License	Docket No. 19168 File No. BRCT-354
COWLES FLORIDA BROADCASTING, INC. (WESH-TV), DAYTONA BEACH, FLA. For Modification of Authorized Facilities	Docket No. 19169 File No. BPCT-4158
CENTRAL FLORIDA ENTERPRISES, INC., DAYTONA BEACH, FLA. For a Construction Permit	Docket No. 19170 File No. BPCT-4346

MEMORANDUM OPINION AND ORDER

(Adopted August 7, 1973; Released August 9, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING AND VOTING TO ADD ISSUES 1, 2, 4 AND 5.

1. This proceeding involves the applications of Cowles Florida Broadcasting, Inc. (Cowles Florida) for modification and renewal of its license for television broadcast Station WESH-TV, operating on Channel 2 in Daytona Beach, Florida, and the mutually exclusive application of Central Florida Enterprises, Inc. (Central) for a construction permit to establish a new commercial television broadcast station operating on the same channel in Daytona Beach. By Order, FCC 71-237, 36 FR 4901, published March 13, 1971, the Commission designated the applications for consolidated hearing on various issues. Thereafter, by Memorandum Opinion and Order, 32 FCC 2d 436, 23 RR 2d 159, released October 26, 1971, the Review Board added Cowles Communications, Inc. (CCI), Cowles' parent corporation, as a party to this proceeding.[1] The applications were redesignated for hearing by Commission Order, FCC 72-149, 37 FR 4929, published March 7, 1972. Now before the Review Board is a petition to enlarge issues, filed March 27, 1973, by Central,[2] requesting the addition of the following issues:

> (1) To determine whether Cowles Florida Broadcasting, Inc. and/or Cowles Communications, Inc. willfully withheld or failed to disclose pertinent information concerning media interests attributable to Cowles Florida Broadcasting, Inc./Cowles Communications, Inc. under Commission precedent;
>
> (2) To determine whether Cowles Florida Broadcasting, Inc./Cowles Communications, Inc. diligently ascertained and disclosed attributable media

[1] CCI was made a party to the proceeding with regard to an issue which was modified by the Board in the cited Memorandum Opinion and Order.

[2] Also before the Review Board are the following related pleadings: (a) opposition, filed April 6, 1973, by Cowles Florida and CCI; (b) Broadcast Bureau's comments, filed April 5, 1973; and (c) reply, filed April 18, 1973, by Central.

interests, or was careless, negligent, or inept in making the showing required with respect to mass media interests in this proceeding;

(3) To determine whether Cowles Florida Broadcasting, Inc./Cowles Communications, Inc. was careless, inept, or lacked diligence in observing required proceedings in this hearing;

(4) To determine, in light of evidence adduced pursuant to the foregoing issues, whether Cowles Florida Broadcasting, Inc. possesses the requisite qualifications to be a Commission licensee;

(5) To determine, in the event Cowles Florida Broadcasting, Inc., is found qualified to be a Commission licensee, the extent to which evidence adduced under issues 1–3 reflects upon comparative qualifications of Cowles Florida Broadcasting, Inc. to operate television Station WESH–TV.

2. Essentially, Central seeks an evidentiary inquiry into the alleged failure of Cowles and CCI to timely disclose all of the interests in media of mass communications attributable to them. To facilitate a better understanding of our disposition of Central's petition, we will first set out some pertinent background facts. Cowles Florida, the licensee of Station WESH–TV, is a wholly owned subsidiary of CCI.[3] CCI also owns all of the stock in Cowles Broadcasting Service, Inc., licensee of Station WREC–AM and FM, Memphis, Tennessee, 23% of the stock of the New York Times Company,[4] and is the licensee for KRNT–AM, FM and TV in Des Moines, Iowa. The principal stockholders of CCI, in turn, are Gardner Cowles, the Des Moines Register and Tribune Company and John H. Perry, Jr.[5] The Des Moines Register and Tribune Company owns approximately 11% of the Minneapolis Star and Tribune Company, which in turn, owns all of the stock in the Wichita-Hutchinson Company, Inc., license of Station KTVH, and 47% of the stock of the licensee corporation of WCCO–AM, FM and TV in Minneapolis, Minnesota.[6]

3. At the May 22, 1972 hearing session, Central contended that CCI and Cowles Florida had not presented a diversification of mass media showing even though the exchange date for comparative exhibits had been scheduled for May 9, 1972. (Tr. 535, 544.) In rebuttal, Cowles Florida stated that it was its position that, as a renewal applicant, it was not essential for it to make a diversification showing (Tr. 544), but that it would do so at the request of the Administrative Law Judge (Tr. 547). On June 6, 1972, Cowles Florida submitted a diversification showing which included a statement of the ownership interests of CCI, including a list of its subsidiaries, officers, directors and stockholders of 1% or more and an exhibit with regard to the ownership of the Des Moines Register and Tribune Company. (Tr. 1272.) Central objected to the showing maintaining that it was inadequate (Tr. 1276), and that the applicant should provide a list of the officers and directors of the various subsidiaries of the New York Times Company (Tr. 1277), a list of the circulation of the Des Moines Register and Tribune newspaper, and areas covered by KRNT–TV (Tr. 1278). Central subsequently filed a memorandum on July 18, 1972 with the Administrative Law Judge requesting that Cowles Florida be assessed a serious

[3] CCI is a corporation whose stock is publicly traded on the New York Stock Exchange.
[4] Derivately, CCI owns a 23% interest in WREC–TV and WQXR–AM and FM because of its interest in the New York Times Company. Official Notice, Ownership Report of CCI's stations KRNT–AM, FM and TV, filed November 22, 1971.
[5] The Ownership Report for KRNT–AM, FM and TV, filed October 30, 1970 indicates that Mr. Cowles, the Des Moines Register and Tribune Company and John H. Perry, Jr., own 13.4%, 9.1% and 8.8% of the stock in CCI, respectively.
[6] Ownership Report for KRNT–AM, FM and TV, filed October 30, 1970.

comparative demerit for willful and continued failure to make a prompt and full disclosure of its mass media interests. Central also contended that Cowles Florida should be disqualified if the failure to disclose its interests persisted. On the following day, July 19, 1972, the Administrative Law Judge issued a Memorandum Opinion and Order, FCC 72M–932, released July 20, 1972, indicating his uncertainty concerning precisely what relief was being sought and stating that he viewed the request for disqualification or a comparative demerit as rhetorical. The Judge questioned whether he had the power to take such action absent a specific issue on the matter. He added that if Central felt that he could issue such an Order, it (Central) should file an amendment to its Memorandum citing the source of such powers. In response, Central filed an amended memorandum on July 28, 1972, withdrawing its request for a demerit against Cowles Florida. Subsequently, on August 24, 1972, the Administrative Law Judge released another Memorandum Opinion and Order, FCC 72M–1065, ruling that Cowles Florida should make a showing on the diversification criteria similar to that which it would make if it were an applicant for an original license. In compliance with this ruling, Cowles Florida submitted Exhibit 128A which answered the questions called for in Section II of FCC Form 301, the application form for a new broadcast station.[7] Exhibit 128A [8] was introduced into evidence on December 6, 1972. On March 7 and March 12, 1973, counsel for Cowles Florida and CCI sent letters to the Administrative Law Judge submitting further legal arguments relating to the media interests attributable to Cowles Florida. Shortly thereafter, on March 27, 1973, the instant petition to enlarge was filed.

DISCLOSURE OF MEDIA INTERESTS

4. While petitioner's arguments are arranged in a discursive and disjointed fashion, it appears that the main thrust of the argument is that a renewal applicant in a comparative proceeding must disclose all media interests attributable to it (citing *WTAR Radio-TV Corporation*, 37 FCC 2d 480, 25 RR 2d 463 (1972)[9]), and that CCI and Cowles Florida have failed, either through willfulness or negligence,

[7] Section II of FCC Form 301 requires that the following information be reported: (a) present or past broadcast interests of the applicant or any other party (officers, directors and stockholders of record) to the application; (b) principal occupations and businesses (over the past five years) of the applicant and its officers, directors and 3% stockholders (for applicants with more than 20 stockholders); (c) any other business or financial enterprise (over the past five years) in which the applicant or its officers, directors and 3% stockholders have or have had a 25% or greater interest or an official relationship; and (d) any other business or financial enterprise (over the past five years) in which a corporation controlling the applicant and its officers, directors and 3% stockholder have or have had a 25% or greater interest or an official relationship.

[8] In Exhibit 128A Cowles Florida disclosed for the first time that John H. Perry, Jr., the third largest shareholder in CCI, is an officer, director and owner of more than a 25% interest in the Palm Beach Cable Television Company and the Martin County Cable Company, Inc. This information was not reflected in Cowles Florida's renewal application.

[9] In *WTAR*, the renewal applicant's parent corporation owned a corporation, which in turn, owned various subsidiary corporations which operated CATV systems. While the applicant reported the CATV systems. It failed to identify the specific communities served by them. In addition, the applicant failed to report that the parent corporation acquired newspaper interests. The Board held that these interests had to be reported and added comparative 1.514 and 1.65 issues.

to disclose those media interests.[10] In opposition, CCI and Cowles Florida contend that Central's petition is untimely and a showing of good cause has not been made explaining the delay in filing. Moreover, both contend that Central's petition is an untimely and improper appeal from the Administrative Law Judge's interlocutory Order of August 24, 1972,[11] which, they argue, ruled on the matter of diversification. On substantive grounds, CCI and Cowles Florida maintain that a renewal applicant need not make a diversification showing in a comparative case, since one is not called for by FCC Form 303, the renewal application. However, they argue, in any event, a diversification showing was made following the Administrative Law Judge's Order of August 24, 1972, *supra*. The Broadcast Bureau also opposes addition of the requested issues on the grounds that the petition is untimely and an unauthorized appeal from the various rulings of the Administrative Law Judge. In reply, Central contends that its petition is not untimely since it was filed as a result of Cowles Florida's "submission" of March 7, 1973,[12] in which, petitioner contends, Cowles Florida attempted to disavow any attribution of the New York Times media interest. In any event, Central argues that the Board can properly enlarge the issues under *The Edgefield-Saluda* doctrine.[13]

5. The Review Board will deny the requested issues. Central's petition is grossly untimely [14] and is not supported by a showing of good cause for the long delay. See *RKO General, Inc.*, — FCC 2d —, 27 RR 2d 1537 (1973). Central's argument that its petition is timely because it is predicated on Cowles Florida's "submission" of March 7, 1973, is unpersuasive because that submission is merely a continuation of the argument that began nearly a year before the petition to enlarge was filed. Moreover, Central's tardiness is further accentuated in light of the Administrative Law Judge's Memorandum Opinion and Order, FCC 72M-932, released on July 20, 1972, wherein he indicated that, absent a specific issue, it was questionable whether he had the power to disqualify or assess a comparative demerit against Cowles Florida for its diversification showing. Furthermore, we do not believe that Central's allegations raise sufficiently serious public interest questions to overcome Central's gross untimeliness and warrant consideration of the petition on its merits. *Cf. Valley Telecasting*

[10] Interspersed throughout Central's lengthy fifty-eight page pleading are particular media interests that Central believes CCI and Cowles Florida should have disclosed to the Commission. These include: a list of the officers and directors in the various subsidiaries of the New York Times Company; and list of the media interests attributable by reason of cross interests in the Minneapolis Tribune and television Station KTVH; a list of the media interests of stockholders of more than 1% interest in CCI; and information concerning the media interests of the Des Moines Register and Tribune Company. Central also notes that the WESH-TV application does not reflect that John H. Perry, Jr. is an officer, director and stockholder of 25% or more in the Palm Beach Cable Television Company and the Martin County Cable Company, Inc., nor does the application reflect that JSP, Inc., a subsidiary of the Des Moines Register and Tribune Company, purchased the Sun Publishing Company.

[11] Memorandum Opinion and Order, FCC 72M-1065, released August 24, 1972, where the Administrative Law Judge ruled that Cowles Florida should make the diversification showing of an applicant for an original license. See paragraph 3, *supra*.

[12] The Board assumes that the "submission" of March 7, 1973, refers to the letters of March 7 and March 12, 1973, relating to the legal arguments concerning the media ownership attributable to Cowles Florida.

[13] *The Edgefield-Saluda Radio Co.*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[14] Section 1.229(b) of the Commission's Rules requires that motions to enlarge issues must be filed no later than 15 days after the Commission's Order designating the hearing has been published in the Federal Register, unless good cause is shown. In the instant proceeding, the redesignation Order was published March 7, 1972, and Central's pleading was not filed until March 27, 1973.

Co., Inc. v. *FCC*, 119 U.S. App. D.C. 169, 338 F.2d 278, 3 RR 2d 2022 (1964). In this connection, the Board finds significant the fact that the renewal application does not call for the information allegedly undisclosed. See footnote 10, *supra*.[15] Nevertheless, Cowles Florida did consent to supply *and* did in fact supply the information requested by the Administrative Law Judge.[16] Finally, petitioner has not shown the significance of the non-broadcast media interests of the subsidiaries of the New York Times Company and the Des Moines Register and Tribune Company.[17] See Report and Order in Docket 14867 (Reporting of Changed Circumstances), 29 FR 15516, 3 RR 2d 1622 (1964). Compare *WTAR, Inc., supra*. Likewise, we do not believe that the failure to disclose John Perry's interests in the Palm Beach Cable Television Company and the Martin County Cable Company until December, 1972 (see note 8, *supra*) warrants either a Rule 1.514 or 1.65 issue. The information is not called for by the application, was voluntarily disclosed by Cowles Florida to the Commission, and it does not appear that the applicant sought to conceal this information from the Commission. See *RKO General, Inc., supra*, 27 RR 2d at 1541, and cases cited therein. *Cf. Gross Broadcasting Co. (KJOG–TV)*, — FCC 2d ——, 27 RR 2d 1543 (1973); Media, Inc., — FCC 2d ———, 27 RR 2d 1077 (1973).

DILIGENCE ISSUE

6. In support of its request for a diligence issue, petitioner alleges: (a) that the Broadcast Bureau opposed two motions to enlarge issues filed by Cowles Florida shortly after the Commission's redesignation Order was published on March 7, 1972, stating that Cowles Florida's conduct in filing the petitions bordered upon an abuse of the Commission's processes; (b) that Cowles Florida failed to serve Central with copies of its March 27, 1972 amendments, one of which was not signed by an officer; and (c) that Cowles Florida failed to serve Central's counsel with copies of its most recent renewal application for WESH–TV and its translator application for McIntosh, Florida. The request is completely without merit. It is well established that a diligence or ineptness issue is warranted only where an applicant's conduct has concerned relevant matters of major significance *and* where the conduct has disclosed a pattern of carelessness and inadvertence. See *Folkways Broadcasting Company, Inc.*, 26 FCC 2d 175, 20 RR 2d 528

[15] Section I, paragraph 7 states: List below other businesses in which the applicant or any officer, director, or principal stockholder (any person owning 25% or more of applicant's stock) has a 25% or more interest. List also any radio station other than the station which is the subject of this application in which any of the above named persons have any interest, and the nature and extent of their interest in the broadcast station.

[16] Cowles Florida's and CCI's position that a renewal applicant in a comparative proceeding need not make a diversification showing is clearly incorrect and contrary to precedent. In *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F. 2d 1201, 22 RR 2d 2001 (1971), the Court stated: "[s]ince one very significant aspect of the public interest, convenience and necessity is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it." 145 U.S. App. D.C. at 44 n. 35, 447 F. 2d at 1213 n. 36, 22 RR 2d at 2019 n. 36. See also *Broadcast Renewal Applicant*, 31 FCC 2d 443, 445 (1971).

[17] In a Memorandum Opinion and Order, FCC 73M–422, released on April 5, 1973, the Administrative Judge ordered Cowles Florida to provide a complete listing of all New York Times media holdings and the direct and indirect media ownership of the Minneapolis Star and Tribune Company.

(1970), and cases cited therein. See also *Alvin L. Korngold*, 40 FCC 2d 536, 27 RR 2d 78 (1973). In our opinion, Central has not shown such conduct on the part of Cowles Florida or CCI; [18] therefore, its request for a diligence issue will be denied.

7. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues against Cowles Florida Broadcasting, Inc./Cowles Communications, Inc., filed March 27, 1973, by Central Florida Enterprises, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[18] Central's request for a diligence issue is also inconsistent with the Commission's policy of avoiding unduly prolonged comparative hearings. *Folkways Broadcasting Company, Inc.*, 26 FCC 2d 175, 179 n. 9, 20 RR 2d 528, 534 n. 9 (1970).

F.C.C. 73-828

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by DIXON CABLE TV, INC., DIXON, ILL. For Special Temporary Authorization	CSR-361 IL022

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 9, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. Dixon Cable TV, Inc. operates a cable television system at Dixon, Illinois, a community located within the Rockford-Freeport, Illinois television market (ranked as the 97th major market). On May 17, 1973, Dixon Cable filed an application for Certificate of Compliance (CAC-2556) and a "Request for Special Temporary Authorization" (CSR-361) to obtain the Commission's authorization to replace the signal of Chicago Illinois station WFLD-TV with that of another Chicago station, WSNS-TV. The reason given for this intended change is the shift of the carriage of Chicago White Sox baseball games from WFLD-TV to WSNS-TV. A Special Temporary Authorization to carry WSNS-TV in lieu of WFLD-TV is requested while final action on the application for certification is pending. Dixon Cable asserts that both the public interest and recent Commission precedent argue for favorable action on its resquests.

2. The following signals are now carried on this system:

WCEE-TV (CBS, Ch. 23), Freeport, Illinois
WTVO (NBC, Ch. 17), Rockford, Illinois
WREX-TV (ABC, Ch. 13), Rockford, Illinois
WHBF-TV (CBS, Ch. 4), Rock Island, Illinois
WQAD-TV (ABC, Ch. 8), Moline, Illinois
WOC-TV (NBC, Ch. 6), Davenport, Iowa
WHA-TV (Educ., Ch. 21), Madison, Wisconsin
KIIN-TV (Educ., Ch. 12), Iowa City, Iowa
WGN-TV (Ind., Ch. 9), Chicago, Illinois
WFLD-TV (Ind., Ch. 32), Chicago, Illinois

Supplanting WFLD-TV with WSNS-TV would not contravene the major market signal carriage rules [1] as the system would continue to provide its subscribers with two independent stations. And, as no additional distant signals will be carried, the system would not incur any obligations under our non-broadcast access rules.[2]

[1] Section 76.63 of the Rules governs signal carriage in the "second-fifty" major television markets.

[2] See Section 76.251(c) of the Rules. The system has operated with these signals since 1970, and is not obligated to comply with Section 76.251 until 1977.

3. We believe the public interest will be served if a Special Temporary Authorization is granted to carry the games of the Chicago White Sox as broadcast by WSNS–TV during the 1973 season, while disposition of the application for certification is pending. Otherwise, programming of a uniquely valuable appeal would be withdrawn from subscribing members of the public.[3] However, we decline to authorize the system to substitute the entire program schedule of WSNS–TV for that of WFLD–TV. Rather, we prefer instead the approach taken in *Video Service Company*, FCC 73–376, 40 FCC 2d 480, which reserves for later consideration those issues which may be presented by Dixon Cable's application for certification when that matter is properly before us.

In view of the foregoing, the Commission finds that the issuance of a special temporary authorization to the extent indicated above would serve the public interest.

Accordingly, IT IS ORDERED, That the "Request for Special Temporary Authorization" filed by Dixon Cable TV, Inc., Dixon, Illinois, IS GRANTED to the extent indicated in Paragraph 3, and otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[3] We are advised by counsel that 3424 subscribers are served by Dixon Cable.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
VOICE FOR INNOCENT VICTIMS OF ABORTION,
BROOKLYN, N.Y.
Concerning Fairness Doctrine Re Station
WNBC–TV, New York, N.Y.

AUGUST 7, 1973.

MR. TIMOTHY HAGGERTY,
Voice for Innocent Victims of Abortion,
P.O. Box 137,
Brooklyn, New York 11024

DEAR MR. HAGGERTY: This is in response to your letter of July 8, 1973 concerning the fairness doctrine obligations which you believe were incurred by Station WNBC–TV, New York, New York, as a result of its broadcast of the program "Research Project" on June 3, 1973. In particular, you state that the program in question featured Dr. Harold Nitowsky, Director of the Genetic Counseling Program at Albert Einstein College of Medicine, who discussed advances in genetics which have made it possible to discover defects or diseases in the unborn fetus, and then "went on to (twice) suggest to abort (kill the growing baby) when it is discovered that the baby will be born retarded or with some defect." You further state that "Dr. Nitowsky's suggestion to abort the unborn baby is the pro-abortionist's solution which puts a relative value on human life—and is in complete contrast to our position which maintains that human life has an inherent value and that its right-to-life is inviolable from before birth," and that such "suggestion" thus presented one side of the controversial issue of public importance of abortion. You have submitted a copy of a letter, dated June 6, 1973, which you sent to WNBC–TV setting forth these claims with respect to the "Research Project" program and requesting that the station, "in accordance with the fairness doctrine," "invite a qualified person from our organization to express our point of view on the related subject of genetic counseling and abortion."

You have also submitted a copy of the station's response to your letter, dated June 18, 1973, which states that after reviewing Dr. Nitowsky's comments, WNBC–TV reached the conclusion that they did not constitute the discussion of one side of a controversial issue of public importance within the meaning of the fairness doctrine. This letter quotes Dr. Nitowsky's remarks as follows:

> There are two important advances which have been made in recent years, and I think one of these is the procedure of amniocentesis, which is outlined schematically here, where one can take a sample of amniotic fluid—this is the fluid that bathes the fetus after about the 15th week of pregnancy—

> **obtain the cells which circulate in the fluid and are derived from the fetus, grown them in culture, and then examine them for their chromosome constitution and also for the various biochemical and metabolic properties of these cells.**
>
> **In this way it is now possible to make a prenatal diagnosis of a variety of genetic problems, and in situations where couples are at risk of having affected children, one can make the diagnosis prenatally and offer them the option—the decision is theirs—to interrupt pregnancy if they so wish to avoid having a child with a lethal disease or a severely incapacitating disease.**
>
> * * * * * * *
>
> **. . . but by means of amniocentesis and prenatal diagnosis to detect a fetus who is destined to be born with the disease in question, so the parents then have the option of not having children who are born destined to die because of one or another problem.**

In denying your request, WNBC–TV noted that it had covered the issue of abortion "at considerable length in the past," and had broadcast interviews with several anti-abortion spokesmen as well as 50 programs in June of 1972 including numerous anti-abortion viewpoints.

Your letter requests "an opinion [as to] whether we are entitled to an opportunity under the 'Fairness Doctrine' to express our point of view on WNBC–TV."

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

Where complaint is made to the Commission under the fairness doctrine, the Commission requires a complainant to (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee *in his overall programming* has not attempted to present opposing views on the issue. *Allen C. Phelps*, 21 FCC 2d 12 (1969). Review of your letter and cor-

respondence with WNBC–TV fails to indicate any allegation or basis for a claim that the station has presented only one side of the abortion issue in its overall programming as opposed to one particular program. In this regard, WNBC–TV states, and you do not dispute, that various anti-abortion spokesmen have appeared on the station and expressed their views on the issue. Therefore, assuming that Dr. Nitowsky can be said to have advocated one side of the abortion issue in a cognizable fashion (not every isolated statement gives rise to fairness obligations), it would appear that the station has afforded the reasonable opportunity contemplated by the fairness doctrine for the presentation of contrasting views on the issue of abortion.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

FOR CHIEF, BROADCAST BUREAU.
WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division.

F.C.C. 73-838

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (PRINCESS ANNE AND POCOMOKE CITY, MD.)[1]	Docket No. 19537 RM-1870

REPORT AND ORDER

(Adopted August 2, 1973; Released August 7, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT.

1. The Commission has before it the Notice of Proposed Rule Making adopted in this proceeding on July 6, 1972, and the comments and reply comments filed by Maranatha, Inc., and by Peter and John Radio Fellowship, Incorporated ("Fellowship").

2. The proceeding was initiated by Maranatha's filing of a petition seeking the assignment of Class B Channel 273 to Princess Anne, Maryland, a community of 975 persons on the DelMarVa peninsula. Maranatha urged the assignment of a Class B channel, even though Princess Anne's population was small, so that a much needed area-wide service could be provided. Maranatha pointed out that in similar circumstances the Commission had made Class B assignments to Tasley and Exmore, Virginia, even though both were quite small communities.

3. The Commission was persuaded that Maranatha's proposal was worth exploring and it issued a Notice of Proposed Rule Making. The Notice, however, did not proceed exactly along the path urged by Maranatha. Instead, the Commission proposed assigning the channel to nearby and larger Pocomoke City, Maryland, and at the same time proposed deleting the unoccupied Class A assignment there. The reasons for this approach were several-fold. First, the Commission's experience with assignments in this area had shown that a need for additional service not providable by Class A stations had led to the assignment of Class B channels to rather small communities. In fact, population distribution in this general area was such that there was a paucity of real population centers in which to make assignments on any other basis. In recognition of this experience, the Commission expressed the tentative view that little purpose would be served by retaining the unoccupied assignment at Pocomoke City, since it did not appear likely that this channel would be activated in competition with a nearby Class B assignment. If the Class A channel were deleted, Pocomoke City would be without an assignment even though it was larger than Princess Anne. Thus, the Notice proposed assigning the Class B channel to Pocomoke City, recognizing the fact that the

[1] The caption of this proceeding has been changed by adding Pocomoke City.

proximity of the communities meant that the use of the channel at Princess Anne remained a viable possibility. At this point, Maranatha was the only party involved.

4. With the release of the Notice, the situation changed and Fellowship joined the picture. Although it, too, was desirous of operating an FM station in the area, Fellowship's comments diverged from those of Maranatha. Although Maranatha accepted the rationale of the Commission's Notice, it continued to believe that its original proposal was preferable. It reiterated its view that Princess Anne warranted a Class B assignment and questioned the Commission's observation that this assignment might preclude use of the existing Class A assignment. It felt that the channel should remain so that it could be utilized when the need arose. Fellowship took a different tack. Having by then decided to apply for the existing Class A assignment at Pocomoke City, Fellowship urged retention of the assignment so that service could commence as early as possible.[2] Fellowship advanced two counterproposals. The first would assign Class B Channel 273 to Pocomoke City while retaining the community's existing Class A assignment. The second would assign the Class B channel to Pocomoke City and transfer the existing Class A assignment from Pocomoke City to Princess Anne. Each of the parties has offered information regarding the need for an assignment to provide a local outlet of expression as well as to provide needed area coverage. Although both favor retention of the Class A assignment, neither appears willing to settle for it.

5. The record clearly indicates that the area is in need of additional service, and there is no way to bring such a wide-area service save by assigning a Class B channel to a relatively small community. As we observed in the Notice, a pattern of assignments has been developing, one based on the use of Class B channels. Our recognition of this pattern is not intended to denigrate the use of Class A channels in this area but serves merely to observe their inability to provide coverage to the thinly populated areas involved. Of course, Class A channels retain their function of providing outlets for local expression, and our point was not that use of Class A channels was unacceptable. It was only that their use was limited and expressions of interest in them even more limited. At first blush, this case appears to indicate an exception to the rule: someone apparently is desirous of operating on a Class A channel. From all indications, however, Fellowship's interest in the Class A channel is solely as a stepping stone to the Class B channel. As we read its pleadings it either would operate on the Class A channel competing for the other channel or would anticipate a modification of license to specify the Class B channel. Neither is consistent with the objectives of the Communications Act, as each forecloses fair competition in the making of a choice of the better applicant.

6. In order for us to retain Channel 221A in the area, we need a bona fide expression of interest in it, not merely as a tool of competition

[2] Fellowship indicated its willingness to have any license or permit granted to it modified to specify operation on the Class B channel if it later were substituted. Such a procedure, effectively foreclosing a comparison of applicants, is clearly inappropriate. This is one of the reasons for the Commission's policy of withholding action on applications until rule making proceedings involving them are concluded.

104-006—73——4

for the Class B channel.[3] To date there has been none. One alternative could be to require an election so that the applicant for the Class A channel could not use any permit on it as a stepping stone. The problem is that Maranatha has expressed no interest in this channel and Fellowship has not indicated such an interest if it could lead no where else. In all likelihood, then, to insist on fairness (and hence an election) is to end interest in the channel. There is no reason to retain a channel that appears to serve no useful purpose. Under these circumstances Channel 221A will be deleted from Pocomoke City.[4]

7. Having concluded that area intermixture is inappropriate we now have to decide which community should be assigned the Class B channel. Practically speaking, there is little difference, since Pocomoke City and Princess Anne are within 15 miles of one another. This being the case, so long as Channel 221A no longer appears in the Table, Class B Channel 273 could be used at either community. Our reason for initially proposing Pocomoke City was simply its larger size. Although Maranatha points to Princess Anne's growth and potential for even greater expansion, a proper resolution of these 307(b) comparative issues could best take place in the context of a comparative hearing. Even if there is no real practical significance to the choice in this context, it seems preferable to follow our usual policy and assign the channel to Pocomoke City, as the larger community.

8. IT IS ORDERED, That effective September 14, 1973, the FM Table of Assignments (Section 73.202(b) of the Commission's Rules) IS AMENDED to read as follows:

City	*Channel No.*
Pocomoke City, Maryland	273

9. Authority for the actions taken herein is contained in Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[3] If we were to accept Fellowship's urgings, we would be forced to construct special rules for a hearing on the Class B channel so that it would not unfairly benefit by virtue of any occupancy of the Class A channel. In fact, competitive reasons might dictate that both would first vie for the Class A channel, thus vitiating any possible advantage in terms of earlier commencement of service.

[4] If, contrary to present appearances, there is a party interested in the Class A channel itself, we would be prepared to take expeditious action on a petition seeking to have it re-assigned.

F.C.C. 73–798

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MIRACLE VALLEY BROADCASTING CO., INC. (WEIF), MOUNDSVILLE, W. VA. Has: 1370 kHz, 1 kW, Day Requests: 1370 kHz, 5 kW, Day For Construction Permit	Docket No. 19794 File No. BP–18338

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released August 1, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it (i) the above-captioned application of WEIF to increase daytime power; (ii) petition to deny filed by WK, Inc., former broadcast licensee of WKWK, Wheeling, West Virginia, and adopted by its successor in interest, Publishers Broadcasting Corporation, the present licensee of WKWK, Wheeling, West Virginia; and (iii) pleadings in opposition and reply thereto.

2. Petitioner failed to set forth the basis of standing as a party in interest. Nevertheless, since petitioner alleges that the applicant would compete with WKWK for audience and revenue, the Commission finds that the petitioner has standing as a party in interest within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *Federal Communications Commission* v. *Sanders Brothers*, 309 U.S. 470, 9 RR 2008 (1940).

3. The initial field intensity measurement data filed in the WEIF application indicated that the proposed 5 mV/m contour would not penetrate the Wheeling city limits. Subsequent measurements submitted by the petitioner made on an azimuth of 17°, however, revealed that the 5 mV/m signal would in fact penetrate the city. Commission analysis of all pertinent data confirms the fact that a significant portion of Wheeling will be within WEIF's proposed 5 mV/m contour.

4. Petitioner contends that the proposed operation comes within the purview of the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190 (1965). Prior to the 1970 census, the petitioner relied upon the 1960 census which indicated Wheeling's population to be 53,400 and Moundsville's population to be 15,163, thus raising the rebuttable presumption that WEIF was realistically proposing to serve Wheeling. When the 1970 census indicated that Wheeling's population had fallen to 46,854,[1] the applicant amended his appli-

[1] Population of Moundsville according to the 1970 census had dropped to 13,420.

cation by documenting the decrease in population and requesting rejection of the 307(b) question. In its supplemental petition to deny, petitioner opposed this contention and, relying on *VWB, Inc.*, 10 RR 2d 563 (1967), attempted to establish a threshold showing that WEIF seeks realistically to serve Wheeling.

5. Petitioner cites *VWB, Inc., supra*, for the proposition that the 5 mV/m–50,000 population test is not an inflexible rule. While conceding that the fact situation in *VWB* is considerably different from the fact pattern of the case now before us,[2] petitioner contends that the main principle of the *VWB* case is that in a situation involving a community with a population under 50,000, the Commission must look to the "totality of the circumstances" in order to ascertain the applicant's intent. Specifically, petitioner argues that WEIF's present primary service of all of Marshall County runs contrary to its purported reason for requesting a power increase; that the power increase bears no relationship to Miracle's ability to meet community needs and problems; that the power increase masks an attempt by WEIF to gain further revenue from Wheeling-based advertising above and beyond the 29 to 33 percent it already has; that WEIF is located within ten miles of Wheeling; and that both communities are in the same Standard Metropolitan Statistical Area (SMSA).

6. The applicant argues (i) that the *VWB* case is inapplicable because Moundsville has its own educational, religious, political, and economic structure; (ii) that although all of Marshall County presently receives primary service, outlying areas will nevertheless benefit from a power increase; (iii) that Wheeling based advertising is designed to encourage Moundsville residents to shop in Wheeling rather than to reach the Wheeling audience itself; (iv) that the revenue from Wheeling is expected to decline because of decreasing population in that area; (v) that permission to move the antenna would have been requested by WEIF had its intent really been to serve Wheeling; and (vi) that only the lower half of Wheeling is penetrated and the extent of coverage is the result of greater conductivity around the Ohio river.

7. Two major factors are repeatedly emphasized in cases involving threshold showings in communities with populations under 50,000. The first requisite is a tremendous disparity in the comparative sizes of the two towns. The second is a showing of social, political, and/or economic dependence. *VWB, supra, Harry D. and Robert E. Stephenson, et al.*, 15 FCC 2d 335 (1968). Further, prior cases make clear that when the larger city has a population under 50,000, the burden on the petitioner to establish a threshold showing is not a light one. The Commission will not designate a proposal for hearing merely because it happens to replace a strong signal over a larger community. *VWB, supra; Durguin Associates*, Inc., 10 FCC 2d 24 (1967). Therefore, the threshold showing must clearly establish a basis upon which the presumption may arise.

[2] In *VWB*, the population of the smaller community was merely 4.2 percent of the larger community while Moundsville is over one-third as populous as Wheeling. The town in *VWB*, further, was dependent upon the larger community economically, politically, educationally, and socially.

8. Petitioner has established that Wheeling and Moundsville are in the same SMSA, are less than ten miles apart, and that WEIF relies to some extent on Wheeling-based revenues. However, in *Durguin, supra*, the Commission found that no threshold showing had been made even though the two communities were less than six miles apart and the larger community was three times as populous as the smaller (21,680 and 6,897, respectively). In distinguishing *Durguin* from *VWB*, the Commission stated that since the smaller community in *Durguin* was over one-third the size of the larger, there was no great disparity in the size of the two towns as existed in the *VWB* case.[3] In addition, no showing of economic, social, political or educational dependence has been made. In *Stephenson, supra*, the larger community had a population of under 50,000. The smaller town was only five miles from the larger, both were within the same metropolitan area, and the residents of the smaller town did considerable shopping in the larger community. In finding that the requisite showing had been made, however, the Commission relied not only on the facts stated above, nor on the "totality of the circumstances," but emphasized instead that its decision was prompted by the relative disparity in the sizes of the towns[4] and by the fact that since the community was so small[5] it would of necessity be dependent upon other communities for revenues. *Id* at 340–341. The Moundsville community, on the other hand, is sizable and is, in fact, the largest city in Marshall County and serves as the county seat. Moreover, the citizens of Moundsville maintain 14 schools, and support 15 different churches. There are over two-hundred retail business establishments and various civic organizations. Commission studies indicate that the power increase would result in WEIF covering approximately twice the area (1,275 square miles) it presently serves and would enable the station to cover virtually all of Marshall County for the first time with a 2 mV/m signal. As a result, approximately 37,000 persons (exclusive of Wheeling residents) living within that contour will receive an additional aural service. Also, an extensive rural area, including several dozen small communities of under 2,500 persons, having a total population of about 72,000 would be encompassed by the proposed 0.5 mV/m contour. In light of the foregoing, we find that no 307(b)-suburban issue has been raised.

9. Petitioner alleges that the applicant failed to conduct a survey as required by the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 19 RR 2d 1901 (1970). By amendments dated January 6, 1972, and September 20, 1972, however, the applicant submitted the survey results for the gain area. The *Primer* requires that where major change applications are involved only the gain area need be surveyed. The amendments submitted by the applicant do provide a breakdown of the population of the gain area, interviews with leaders of the representative groups in the area, list the needs of the communities in the area and reflect in sufficient detail the programming to meet community needs. Therefore, the Commission finds that the applicant has complied with the basic *Primer* requirements.

10. Petitioner also alleges that the applicant is not financially quali-

[3] Present census figures place Wheeling's population at 46,854 and Moundsville at 13,420, a ratio of slightly more than 3 to 1.
[4] The smaller town was roughly 4 percent of the size of the larger.
[5] Population, 1,500.

fied to construct the proposal. Subsequent to the filing of the petition, the applicant filed additional financial information. Examination of these data shows that $20,673 will be required to effect the necessary change in operation. Of this total, $19,173 will be needed for equipment and $1,500 for miscellaneous expense. To meet these expenses, the applicant relies on a $30,000 loan from its principal stockholder, Fred Grewe, Jr. Examination of Mr. Grewe's balance sheet shows that although he appears to have more than enough total net assets to make such a loan, he has failed to segregate his current liabilities from his long-term obligations as required by the instructions to section III of FCC Form 301. Under these circumstances we must consider all Mr. Grewe's liabilities to be current (i.e., due within one year) and, on this basis, we find that sufficient liquid and current assets in excess of current liabilities have not been indicated. Accordingly, a financial issue will be included and Mr. Grewe will be afforded the opportunity to file a more detailed financial statement.

11. Petitioner contends that the use of an inaccurate contour map for advertising promotion constitutes deceptive business practices in violation of section 5 of the Federal Trade Commission Act, 38 Stat., 719, 15 U.S.C. 45 § 5, and that a hearing must be held on this matter to determine whether the applicant possesses the necessary qualifications of a Commission licensee. *Universal Communications of Pittsburgh, Inc.*, 17 RR 2d 1262 (1969) (Recon. denied, 21 FCC 2d 542, 18 RR 2d 491 (1970)) dealt with a rate card which substantially exaggerated the coverage area. In that case, the Commission stated:

> Use of an inaccurate and exaggerated coverage map will not be tolerated. Any practice *intended* to deceive or mislead advertisers or the public cannot be condoned. 17 RR 2d at 1262 (Emphasis added).

WEIF contends that the requisite intent to deceive is lacking in this case. Applicant maintains that the map was used innocently, that it had been prepared under the direction of the prior owners of the station, that it was designed by a reputable engineering firm and that since the owners are not engineers, they had no way of knowing whether or not the map was accurate. Petitioner asserts that WEIF's use of the map could not have been innocent since subsequent engineering data prepared by the licensee in connection with this application reflects the inaccuracy of the rate card.[6]

12. The Review Board in *Athens Broadcasting Company, Inc.*, 27 FCC 2d 7 (1971), enlarged issues in a comparative hearing to inquire into misrepresentations as to the coverage area of a station. Further, in *Radio Clinton, Inc.*, 73 FCC 463, the Commission stated that discontinued use of a coverage map on its rate card will not obviate the need for further inquiry. Because of the gravity of the charges, we believe further inquiry is necessary. Accordingly, an appropriate issue will be specified. Since WEIF's license was renewed last year for the period ending October 1, 1975, there is no application presently before the Commission against which an ultimate adverse conclusion concerning basic licensee qualifications could be applied. However, we believe that

[6] In this connection, we note that not only did the 0.5 mV/m contour depicted on the WEIF rate card encompass a considerably larger area than the *proposed* 0.5 mV/m contour shown on the engineering exhibits in this application, but it also encompassed a larger area than did the coverage map used by the prior owners of the station.

the facts developed on the issue should also be considered in connection with a determination as to whether a grant of the application before us would serve the public interest. In addition, if the issue as to basic licensee qualifications is decided adversely to the applicant in this proceeding, findings of fact made under this issue will be considered *res judicata* with respect to those matters in passing upon the next-filed renewal of license application.

13. Except as indicated by the issues specified below, the applicant is qualified to construct and operate as proposed. In view of the foregoing, however, the Commission is unable to make the statutory finding that a grant of the subject application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

14. Accordingly, IT IS ORDERED, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Fred Grewe, Jr., has sufficient net current liquid assets to finance the proposed construction and, in light thereof, whether Miracle Valley Broadcasting Company, Inc., is financially qualified.
2. To determine whether Miracle Valley Broadcasting Company, Inc., employed a deceptive coverage map on the WEIF rate card, and, if so, whether it continues to possess the requisite qualifications to be a broadcast licensee.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

15. IT IS FURTHER ORDERED, That, the petition to deny of Publishers Broadcasting Company, Inc., IS GRANTED to the extent indicated above and IS DENIED in all other respects.

16. IT IS FURTHER ORDERED, That Publishers Broadcasting Corporation, licensee of station WKWK, Wheeling, West Virginia, IS MADE A PARTY to the proceeding.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and party respondent herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73–818

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application CATHRYN C. MURPHY, VANCOUVER, WASH. For Renewal of License of Station KVAN, Vancouver, Wash.	Docket No. 18672 File No. BL–12263

APPEARANCES

Samuel Miller, *Mark E. Fields*, and *Gerald Miller* on behalf of Cathryn C. Murphy and Ada C. Brown, Conservatrix of Cathryn C. Murphy; Ada C. Brown, *pro se*[1]; and *Thomas B. Fitzpatrick* and *Henry L. Baumann* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted August 2, 1973; Released August 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING. COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER WILEY ABSTAINING FROM VOTING.

1. This proceeding involves the application of Cathryn C. Murphy for renewal of license for standard broadcast station KVAN, Vancouver, Washington. The application was designated for hearing[2] on issues to determine: (1) the efforts made by Cathryn C. Murphy in ascertaining the community needs and interests of KVAN's service area, and the means by which she proposed to meet those needs and interests; (2) the facts and circumstances surrounding the failure of Cathryn C. Murphy to file timely reports and applications, and to respond to official Commission correspondence during the period from 1965 to the date of the order; (3) the facts and circumstances surrounding the relocation of KVAN; (4) whether Cathryn C. Murphy had been so careless or had evidenced such disregard for the Commission's rules and reporting requirements that she could not be relied upon to fulfill the responsibilities of a Commission licensee; and ultimately, (5) whether a grant of the renewal application would serve the public interest, convenience, and necessity. In a Memorandum Opinion and Order, FCC 71R–196, released June 21, 1971, the Review Board added an issue to determine the circumstances surrounding the preparation of an engineering application filed by Cathryn C. Murphy on March 15, 1971; whether that application contained misrepre-

[1] On May 3, 1973, the Commission granted Mrs. Brown's request to appear personally and participate in oral argument.
[2] Memorandum Opinion and Order, FCC 69–1025, released September 30, 1969.

sentations to the Commission; and if so, the effect thereof on Mrs. Murphy's qualifications to continue as a Commission licensee.

2. In an Initial Decision, FCC 72D–60, released September 11, 1972, Administrative Law Judge Millard F. French proposed to deny the KVAN renewal application. While he resolved the ascertainment of community needs issue in Mrs. Murphy's favor, he made factual findings adverse to her on all of the other hearing issues.[3] He also found Mrs. Murphy had repeatedly made misrepresentations to the Commission in hearing testimony and in affidavits filed with the Commission, and that she had procured false testimony and affidavits from others which were submitted to the Commission. After careful consideration, we are convinced the findings of fact of the late Administrative Law Judge are amply supported by substantial evidence. We therefore adopt such findings except as modified in our rulings on the exceptions, attached hereto as an appendix.

3. The infractions chargeable to Cathryn C. Murphy are of the most serious nature, and ordinarily we would agree with the Administrative Law Judge's conclusion that renewal should be denied. We are faced here, however, with unusual circumstances which we believe justify moderation in our actions. On October 2, 1972, an application was filed on Mrs. Murphy's behalf for involuntary assignment of the KVAN license to her conservatrix, Ada C. Brown, pursuant to an order of the Circuit Court of the State of Oregon for the County of Multnomah. We granted involuntary assignment of license and permit on November 23, 1972. Accompanying the assignment application was a statement of Mrs. Murphy's personal physician noting Mrs. Murphy's long-standing alcoholism and stating that she was at that time a patient at a sanitarium for treatment of her drinking problem. The physician offered a prognosis that because of physical and mental damage resulting from her chronic alcoholism (including possible brain damage), Mrs. Murphy would never be able to accept the responsibilities of conducting a business. Similar representations concerning Mrs. Murphy's health were made by the Conservatrix during Oral Argument in this proceeding on May 24, 1973.[4]

4. Ada C. Brown is the mother of Cathryn C. Murphy. She is also a creditor of KVAN, having advanced (or lent) her daughter over $160,000 to continue operation of the station. There is no evidence of involvement by Mrs. Brown in the derelictions of KVAN. We do not wish to penalize her efforts to assist her daughter financially. Also, we recognize that the special facts of this case indicate Mrs. Murphy, because of her illness, may not have been totally responsible for her actions. On two previous occasions we have, because of equitable considerations, departed from our fundamental policy precluding consideration of assignment applications when the character qualifications of the assignor are in question. *Martin R. Karig*, 3 RR 2d 669, and 3 RR 2d 671 (1964); and *Tinker, Inc.*, 9 RR 2d 1239 (1967); *contra*, *Milton Broadcasting Co.*, 12 FCC 2d 354, 12 RR 2d 1077 (1968). We think similar equitable considerations warrant a grant of

[3] The Administrative Law Judge treated all issues except the ascertainment issue as subsumed into the issue determining whether the Commission could continue to rely upon Mrs. Murphy as a licensee.

[4] It does not appear the Administrative Law Judge was aware of either the existence or full extent of Mrs. Murphy's alcoholism. We take official notice of the medical affidavit in the transfer application regarding this problem.

the instant renewal application, subject to the condition that the licensee promptly dispose of the station license, without profit, to a qualified assignee.

5. We wish to stress the extraordinary nature of the action we take today. Our policy has been and will continue to be to refuse to consider assignment applications where a character qualifications issue has been resolved against the assignor, or where such an issue is still pending. Upon denial of an application for renewal, there is no authorization to assign. *See Jefferson Radio Co., Inc.* v. *FCC*, 119 U.S. App. D.C. 256, 340 F. 2d 781, 2 RR 2d 2090 (1964). We shall grant the instant renewal application conditionally only because of the unusual nature of Mrs. Murphy's illness and because it is apparent that neither the wrongdoer nor the Conservatrix will profit from our action.

6. We also have before us a Conditional Petition to Reopen the Record and Remand for Further Hearing, filed by the Broadcast Bureau on September 28, 1972. That petition alleges additional technical violations by KVAN during the period preceding the involuntary assignment to Mrs. Brown. In view of our disposition of this proceeding, we will dismiss the Bureau's petition.

7. ACCORDINGLY, IT IS ORDERED That the Conditional Petition to Reopen Record and Remand for Further Hearing filed by the Broadcast Bureau on September 28, 1972, IS DISMISSED.

8. IT IS FURTHER ORDERED That the application of Ada C. Brown, conservatrix of Cathryn C. Murphy, for renewal of the license of standard broadcast station KVAN, Vancouver, Washington, IS GRANTED, subject to the condition that the licensee shall file an appropriate application with the Commission to assign the station license to a qualified assignee within six (6) months of the release of this decision.

9. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

RULINGS ON EXCEPTIONS OF CATHRYN C. MURPHY

Exception No.	*Ruling*
1, 2, 4, 5, 7, 8, 9, 11, 12, 14, 15, 19, 20, 22.	Denied. Judge French's findings adequately and correctly reflect the record.
3, 13	Denied as being of no decisional significance.
6	Denied. The record reveals Nelson did make log entries sufficient to determine operating power, although these may have been in the form of plate voltage and current readings rather than direct readings.
10	Denied. Judge French's findings adequately and correctly reflect the record. The exception is argumentative and not of decisional significance.
16	Granted in part. The record reveals that Mrs. Murphy claimed she had an agreement, and not a contract, to broadcast international news programs of the Pacific Broadcasting System (Bureau Exhibit 1, Item 91, p. 6). However, this still conflicts with her admission during testimony that she never had an agreement with the Pacific Broadcasting System (Transcript p. 269, l. 12–14).

Exception No.	*Ruling*
17, 18	Denied. Judge French's findings adequately and correctly reflect the record. In any event, the findings are adequately supported by the testimony of John F. Barry, whose veracity is unchallenged.
21	Denied. Judge French's findings adequately and correctly reflect the record. Nelson's testimony is amply corroborated by the testimony of Harold Singleton and Francis McCann.
23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36.	Denied. We agree with Judge French's conclusions.
37, 38	Granted in part. See discussion in paragraph 4 of the Decision.

F.C.C. 72D-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CATHRYN C. MURPHY, VANCOUVER, WASH. For Renewal of License of Station KVAN, Vancouver, Wash.	Docket No. 18672 File No. BL-12263

APPEARANCES

Mark E. Fields, on behalf of Cathryn C. Murphy; and *Richard M. Riehl*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER MILLARD F. FRENCH

(Issued September 5, 1972; Released September 11, 1972)

PRELIMINARY STATEMENT

1. By order released September 30, 1969, the Commission designated the above application of radio station KVAN, Vancouver, Washington, for hearing pursuant to specified issues. On April 28, 1971, the Bureau requested that the issues be enlarged to include matters relating to the filing by the licensee of a license application in March 1971. The Review Board granted this request by Memorandum Opinion and Order released June 21, 1971. This matter came on for hearing in Vancouver, Washington, on July 13, 1971, under the following issues, as renumbered by the Hearing Examiner:

(1) To determine the efforts made by Mrs. Cathryn C. Murphy to ascertain the community needs and interests of the area to be served by Station KVAN and the means by which she proposes to meet those needs and interests;

(2) To determine the facts and circumstances surrounding Mrs. Murphy's failure to file timely Commission reports and applications, and to respond to official Commission correspondence, during the period 1965 to the present;

(3) To determine the facts and circumstances surrounding the relocation of KVAN to its present site on North Portland Road, North Portland, Oregon;

(4) To determine whether Mrs. Murphy has been so careless or has evidenced such disregard for the Commission's Rules and reporting requirements that she cannot be relied upon to fulfill the responsibilities imposed upon her as a licensee of this Commission;

(5) To determine the circumstances surrounding the preparation of the engineering portion of the license application filed March 15, 1971, by Cathryn C. Murphy, whether that application contains misrepresentations to the Commission, and, if so, the effect thereof on the qualifications of Cathryn C. Murphy to continue to be a Commission licensee; and

(6) To determine whether, in light of the evidence adduced pursuant to the foregoing issues, a grant of Mrs. Murphy's application would serve the public interest, convenience and necessity.

Prehearing conferences were held on November 10, 1969; May 26, 1970; and March 11 and June 24, 1971. The hearing was held in Vancouver, Washington, on July 13, 14, 15 and 16, 1971, with later sessions in Washington, D.C. on August 10, October 4 and November 9, 1971. The record was closed on the latter date. The record was reopened by order of the Hearing Examiner released February 16, 1972. A further hearing conference was held on February 24, 1972, and the record was again closed on that date.

Findings of Fact

BACKGROUND

2. Cathryn Murphy and her former husband, William B. Murphy, as a partnership operated KVAN beginning in 1958. The station location at that time was Camas, Washington. In 1960 Mrs. Murphy became the licensee. In 1962 KVAN was moved to Hayden Island, a large island in the Columbia River between Portland, Oregon and Vancouver, Washington, with the latter city specified as station location. KVAN was located on leased land. In 1968 the landlord gave notice that Mrs. Murphy's lease would not be renewed. She immediately began looking for a new site. She found that land costs in Clark County, Washington and Multnomah County, Oregon had increased greatly in a short time. She finally located land in North Portland, within 1½ miles of the existing KVAN site on Hayden Island which she was leaving, and filed her aplication to move KVAN to the new site on April 1, 1969. This application specified the new site as 11805 North Portland Road.

ASCERTAINMENT OF COMMUNITY NEEDS—ISSUE 1

3. Cathryn Murphy and Robert Ancheta, a staff member, interviewed approximately 100 persons in Vancouver itself, and surrounding communities in Washington and Oregon in 1969–71. Mrs. Murphy made over 80% of the contacts.

4. Vancouver itself is the largest city in Clark County, Washington. Clark County's population is 128,454; Vancouver's population is 42,493. Clark County lies on the Columbia River, directly across from Portland, Oregon's largest city. Clark County is part of the Portland Standard Metropolitan Statistical Area. Vancouver is now largely a suburb of Portland, in that many Vancouver residents work in Portland. But Vancouver has a full complement of stores and factories. Of total employment, 36% is white collar and 33% is in manufacturing. The northwest has a large logging industry, and the types of manufacturing establishments most heavily represented in Vancouver are paper and printing, and lumber and wood products. Clark County is 58.9% urban. It is overwhelmingly white; only 0.5% of the residents are black.

5. Mrs. Murphy and Mr. Ancheta interviewed various persons in Portland, Gladstone, Troutdale, Boring, Milwaukie, Clackamas, Lake Oswego, Burlington, Scappoose, Souve Island and Beaverton, Oregon, and La Center, Ridgefield, Washougal, Orchards, Woodland, Battle

Ground, Deluth Corner, Brush Prairie, Ariel and Camas, Washington, as well as a large number in Vancouver itself. They interviewed, among others, the following community leaders: mayor of Vancouver, deputy superintendent of schools of Portland, state manager of the Veterans Administration, district attorney of Portland, president of the Portland Chamber of Commerce, the Catholic archibishop of Portland, a rabbi, a Catholic priest, the president of the Navy League, the superintendent of the School for the Blind, the city manager of Vancouver, a city councilman, Lutheran pastors, a deputy prosecuting attorney, the postmaster of Vancouver, the president of Portland's first black-owned bank, the mayor of Portland, and the manager of Goodwill stores.

6. The main problems uncovered by their survey were:

a. Washington has a sales tax, but Oregon does not. This hurts stores in Washington.
b. Need for more parking facilities.
c. Widespread unemployment.
d. Racial prejudice; friction and discrimination.
e. Excessive spending by government.
f. Taxes are too high.
g. Too many people on welfare.
h. Widespread use of narcotics.
i. Vandalism and juvenile delinquency.
j. Traffic jams, especially on the Columbia River bridges and approaches.
k. Water and air pollution.

7. To meet the needs ascertained by the foregoing surveys, the applicant proposes the following programs:

Holy Rosary (every morning, carried at 7:00 p.m. in summer; 15 minutes; furnished by the Holy Name Society; also carried at 6:45 a.m.). Prayers recited at the Catholic Church in Vancouver.

Sacred Heart Hour (every day at 6:30 a.m.; 15 minutes; furnished recorded by St. Louis University). Messages and songs. The majority of the program consists of talks, in which current moral issues are discussed.

College Discussion (Sunday, 10:00 a.m.; 15 minutes). Students, faculty and other concerned individuals report on the latest happenings at area colleges and universities, and trends in student life (good or bad).

Ecology (Saturday, 4:00 p.m.; 10 minutes). Reports from government agencies (federal, state, local) concerned with protection of waterways, forests and other natural resources, and views of businessmen concerned with problems of environmental protection.

Vancouver Roundtable (alternate Sundays, 9:30 a.m.; 30 minutes). Government officials and concerned citizens discuss the city's needs and its problems, and what can be done about them.

Area Roundtable (alternate Sundays, 9:30 a.m.; 30 minutes). Government officials and interested citizens (primarily from the communities in KVAN's service area outside Vancouver) report on steps being taken by government agencies and private groups to improve conditions in the area.

ISSUES 2, 3, 4 AND 5

8. The remaining issues in this proceeding relate to and are subsumed into issue number 4 which relates in essence to the determination of whether the Commission can any longer rely on Mrs. Murphy as a licensee. As a consequence, no attempt will be made to place any of the acts of misconduct within any of the other specified issues in these findings of fact. Rather, each will be dealt with as a separate factual matter

under issue number 4, without reference to any other issue under which it might also fall.

9. Issue 2, of the designation order, recites Mrs. Murphy's failure to file timely financial reports in 1965, 1966 and 1968 and her failure to file her 1966 renewal application on time. However, the Commission's experience with this licensee regarding the filing of timely reports and applications and responding to Commission correspondence extends over a substantially longer period of time. In 1964, the Commission admonished Mrs. Murphy regarding her failures to respond to Notices of Violations following an inspection of her station and to Commission requests for information regarding her then pending renewal application. Five months later, in February 1965, the Commission, in granting Mrs. Murphy what amounted to a short-term license renewal, recited her many past reporting deficiencies, and warned her that during the remainder of that license term the manner in which she fulfilled her responsibilities to the Commission would be carefully scrutinized. Nevertheless, Mrs. Murphy filed her 1966 renewal application over two months late.

10. On May 20, 1966, the Commission was again compelled to write Mrs. Murphy and direct that she respond to previous Commission correspondence relating to: (1) Survey of Political Advertising; and (2) failure to file financial reports. It further noted that with regard to her late filed renewal application, the publication requirements had not been complied with until May 1966—five months later. It also advised that her past derelictions and current failures in this regard directly affect her qualifications to remain a licensee of this Commission.

11. Subsequently, in July 1967, Mrs. Murphy failed to respond to a Notice of Apparent Liability in the amount of $500. The Commission had to prod her into responding more than six months later. Notwithstanding the foregoing warnings, Mrs. Murphy again failed to file her current renewal application on time. In fact, it was not filed until two days after KVAN's license had expired. She paid a forfeiture of $200 for this failure. Mrs. Murphy's representations with respect to the filing of this renewal application will be dealt with, *infra*. None of the foregoing seemed to affect Mrs. Murphy's pattern of conduct. With respect to this current application, the staff requested additional information. However, Mrs. Murphy did not respond until she was threatened with having her license application dismissed for failure to prosecute.

12. Mrs. Murphy offered little at the hearing in the way of explaining these past failures. She claimed that the only financial report she filed late was in 1966. She also attempted to establish that Commission mail to her may have been misdirected, because she had received the mail of another licensee in the Portland-Vancouver area. She admitted, however, that she knew of no time when her mail had been misdirected. These excuses, as well as her explanations in the written responses to the Commission's correspondence referred to in other paragraphs herein, must be weighed against other matters of record, detailed *infra*.

13. The designation order, in paragraph 5, recites that Mrs. Murphy, since she became licensee of KVAN in 1960, has been cited for 122 violations of the Commission's Rules for which forfeitures have been imposed on three occasions, two in the amount of $500 and one in the

amount of $200. These violations were admitted in a stipulation filed by the applicant and the Broadcast Bureau.

14. On September 22, 1970, Station KVAN was inspected by members of the Commission's Portland Field Office. The Notice of Violation, mailed November 4, 1970, cited nine rule infractions, including operation at reduced power. The station was noted, during the two weeks preceding the inspection, to have been operating at a power as low as 280 watts to a maximum of 508 watts instead of at its authorized power of 1,000 watts.

15. In her response, dated December 8, 1970, filed over 30 days after the notice was issued instead of within the 10 days as required, Mrs. Murphy claimed: (1) that the chief engineer had failed to log the low power operation: (2) that he had assured her the signal was better than when he took over as chief engineer; (3) that she was certain they were operating at 1,000 watts at the time of the inspection; and (4) in any event, the station, on the date of the response, was operating at a full 1,000 watts. Mrs. Murphy affirmed the truthfulness of these representations at the hearing.

16. In July 1970 the KVAN transmitter "blew up" damaging 80% of the parts in the transmitter's low voltage power supply. No spare parts were available at the station and, since the station's chief engineer, Donald Nelson, could not reach either Mrs. Murphy or her mother, Mrs. Brown, he placed an order for the needed parts with Collins Radio. He was told they would arrive the next day via air freight. When Nelson advised Mrs. Murphy of what he had done, she told him he had exceeded his authority and the next day she refused to accept delivery of the parts. He also explained to Mrs. Murphy and her mother on several occasions the reasons he needed these parts, including the fact that without them the station could not operate at full power.

17. The station's transmitter ceased operating again in early September 1970. Mr. Nelson again attempted to order the parts from Collins, but they refused to send them. He did obtain some old parts, as he had following the July outage, which did not match the transmitter. Thereafter, it would work, but Mr. Nelson was never able to achieve full power with full modulation. From July 1970 until February 1971, when he was discharged, Nelson repeatedly brought to Mrs. Murphy's attention the need for proper parts for the transmitter. After the September 1970 breakdown, Nelson's conversations with Mrs. Murphy regarding the reasons proper parts were needed and Mrs. Murphy's refusal to obtain them were overheard by another station employee, John Barry.

18. Finally, in November 1970, Mr. Nelson wrote a letter and posted it on the bulletin board. This letter, witnessed by Mr. Barry, recited the inability of the transmitter to achieve full power without the proper parts and specified the parts which were needed. A copy was given Mrs. Murphy's daughter, Ada, the evening it was posted. Ada called Mrs. Murphy that evening and read the contents to her over the telephone. The parts listed in the letter needed to achieve full power were those which needed replacing following the September 1970 breakdown.

19. The mismatched parts described by Mr. Nelson were confirmed by Mr. Bryce Howard, a chief engineer at another radio station in Portland, who had been called in by Mrs. Murphy to assist Mr. Nelson. He also advised Mrs. Murphy that she needed to obtain proper parts and testing equipment in order to properly maintain and service her broadcast equipment. According to Nelson, Mrs. Murphy had not supplied the proper parts for the transmitter by the time his employment was terminated in February 1971. The continued low power operation from September 1970 to April 1971 was also confirmed by FCC monitorings of the station.

20. With regard to Mrs. Murphy's claim that Mr. Nelson failed to log the low power operation, Mr. Leslie Tinkler, the inspecting officer, testified that he was able to determine the operating power of KVAN during the September 1970 inspection (by the indirect method) from entries made on the operating logs.

21. The foregoing facts establish that Mrs. Murphy made misrepresentations to this Commission in her December 8, 1970 response and in her testimony in this proceeding with respect to her knowledge of the technical deficiency at KVAN and her responsibility therefor. Her actions in this regard must be considered in evaluating her explanation regarding technical violations occurring at KVAN through mid-1968. According to Mrs. Murphy, her chief engineer from the time she became licensee of KVAN in 1960 until he died in 1968 was a man she referred to as Lou (Loyal) Conley. Mrs. Murphy claimed that while he was chief engineer, he took care of everything. She believed he was always doing a good job, and was maintaining the station properly.

22. Mrs. Murphy's claim that Conley had been her chief engineer since 1960 is contradicted by her own prior representations to the Commission that she did not employ him until late 1962. Similarly, she had represented that Conley left her employ some time between October 1965 and March 1966 and did not return to the station until February 1967.

23. Mrs. Murphy's attempt to shift responsibility for the technical violations during this period to a dead man is also open to doubt. Francis McCann, the Engineer in Charge of the Portland Field Office, related the substance of several conversations he had with Mr. Conley regarding the technical violations at the station while Conley was employed there. Conley, like Nelson in 1970, indicated that management (Mrs. Murphy) would not authorize him to do those things necessary to properly maintain the station.

RELOCATION OF KVAN—ISSUE 3

24. On April 1, 1969 Mrs. Murphy filed an application to change the transmitter location of KVAN from Hayden Island to 11805 North Portland Road. She received authority to operate from this new location with a temporary antenna on the same date.

25. By letter dated July 31, 1969, Mrs. Murphy requested permission to move her transmitter to a location "approximately one-half mile" with the address 11665 North Portland Road. By letter dated August 16, 1969, Mrs. Murphy submitted an amendment to her ap-

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plication for this proposed change in transmitter location. In that letter she also recited that "the proposed change is less than half a mile," and her sole reason for this proposed change was "because of flooding conditions discovered at the first site." Temporary authority to operate from this new location was granted by the Commission on August 25, 1969. However, Mrs. Murphy had already moved her transmitter to a new location by July 31, 1969, prior to the Commission having received any notification of her intentions in this regard. It was on this basis that issue number 3 was included in this proceeding.

26. KVAN was inspected by a member of the Portland Field Office on August 4, 1969 and was cited, among others, for operating from an unauthorized location (11197 and 11665 North Portland Road). In response to the Notice of Violation in which the operation from an unauthorized transmitter location was first noted, Mrs. Murphy described her new location as "next door" to the old; claimed her new location was only 0.3 mile from the old site rather than the 0.7 mile noted by the inspector; and again, gave as her only reason for changing sites as frightening flooding conditions. On October 9, 1969, shortly after designation, Mrs. Murphy responded to a "Continuation Notice." Again, the only reason given for changing transmitter sites was flooding conditions.

27. In her direct written testimony, executed in May 1971, Mrs. Murphy, for the first time, claimed two additional reasons for moving her transmitter to its present location. First, after she had moved to her new transmitter site in April 1969, she discovered that she had moved, by mistake, on to land owned by the City of Portland and was told she had to get off. Second, one of her temporary antenna towers had been located in such a place that the guy wires were too close to the lines of the telephone company and that the telephone company representative repeatedly visited KVAN and told her she would have to move the tower. She also claimed in this testimony that she had only moved three-tenths of a mile from her first site on North Portland Road (11805) to her present site (11197), and that an engineer at the Commission advised her that she could move her transmitter elsewhere "in the same area" without the need for prior Commission authorization.

28. In her testimony at the hearing, Mrs. Murphy affirmed and amplified these written representations. With regard to her claim that she had been located on City of Portland property by mistake, she testified that she had permission to go on the property (11805 North Portland Road) before the lease was signed, but that negotiations took so long that by the time they were to sign the lease she had discovered she was not on the lessor's property (Moore Kiln Company) and so didn't pay them for the time she was there. The way she found out that she was on City of Portland property was that the real estate agent for the city, Mr. B. J. Smith, called her and told her this was the case. She also testified that the telephone company representative, Mr. Staley, came to her transmitter site seven or eight times and told her, because of the safety hazard, she would have to get out of there.

29. The record is clear that KVAN operated from only two sites on North Portland Road after it moved from Hayden Island. However, the Broadcast Bureau introduced a map that depicts the various transmitter locations of KVAN as specified by Mrs. Murphy in various applications and amendments filed with the Commission. Briefly, Point 1 on the map locates KVAN's original transmitter site on Hayden Island. Point 2 is the site specified in Mrs. Murphy's application to change transmitter site filed April 1, 1969 and identified as 11805 North Portland Road. Point 3 is the site coordinates specified in Mrs. Murphy's amendment to this application filed on August 20, 1969 (after she had already changed location). Point 4 is the location as depicted on an aerial photograph submitted with the same amendment. The Points 3 and 4 locations were described as 11665 North Portland Road. Point 5 is the site specified in the license application filed in March 1971 to cover Mrs. Murphy's application, as amended, to change transmitter location and is described as 11197 North Portland Road.

30. All of the witnesses agree, including Mrs. Murphy, that Point 5 is the place where Mrs. Murphy moved KVAN on July 31, 1969, without Commission authorization. The witnesses, including Mrs. Murphy, also agree that KVAN operated from only one other location on North Portland Road prior to July 31, 1969. All of the witnesses, except Mrs. Murphy, agree that that location was 11805 North Portland Road (Point 2). It is thus clear that the site specified in the August 20 amendment (Points 3 and 4) was false. Thus, as noted in paragraphs 25 and 26, *supra*, from the time she changed location in July through October 9, 1969, less than 10 days after designation for hearing, Mrs. Murphy did not contend that her original location on North Portland Road (Point 2) was incorrect. Further, the locations specified in her August amendment (Points 3 and 4) fit her verbal description of the distance between her old and new sites as set forth in contemporaneous written statements to the Commission. For example, Point 3 is less than one-tenth of a mile from Point 2 and Point 4 is approximately three-tenths of a mile from Point 2. Mrs. Murphy described her new location on two occasions as "less than one-half mile"; on two other occasions as three-tenths of a mile; and, as right next door on another occasion. On the other hand, the distance between Point 2 and Point 5 (the actual location of her transmitter) is seven-tenths of a mile. In addition, all witnesses, other than Mrs. Murphy, agreed and identified KVAN's first location on North Portland Road at Point 2, on the Moore Kiln Company property, rather than on the property of the City of Portland as claimed by Mrs. Murphy in this proceeding. Finally, the August 20, 1969 amendment which depicted Points 3 and 4 as KVAN's new location, was prepared by Mrs. Murphy's former husband in Hawaii based on maps and information supplied by her. Mr. Murphy never viewed the new location before the amendment was prepared and filed.

31. It was not until May 1971, shortly before the hearing was scheduled to commence, that Mrs. Murphy first claimed that when she moved KVAN from Hayden Island to her first location on North Portland Road, she had moved on to City of Portland property by mistake (paragraph 27, *supra*). Thus, according to Mrs. Murphy, she

had actually been operating on City of Portland property (approximately Point 4) between April and the end of July 1969, rather than Point 2 as specified in her application. The distance between Points 4 and 5 as scaled on the map is slightly under three-tenths of a mile. This would also comport with her earlier representations regarding the distance between her two sites on North Portland Road (paragraphs 27 and 28, *supra*). As set forth in paragraph 30, *supra*, the witnesses established KVAN's first operating location as Point 2 on the map, which is on the property of the Moore Kiln Company, approximately three-tenths of a mile from the Moore Kiln Company-City of Portland property line. These witnesses were FCC Inspector Leslie Tinkler and Consulting Engineer Harold Singleton.

32. As discussed in paragraph 27, *supra*, Mrs. Murphy first claimed other circumstances, in addition to flooding, as reasons for her moving the location of KVAN without prior Commission consent, in May 1971. The additional reasons were:

> a. She had been moved by mistake on to City of Portland property and was ordered to get off;
> b. One of her antenna poles was too close to some telephone lines and she was told she had to remove it; and
> c. An engineer at the Commission had advised her that she didn't need prior Commission authorization if she moved her transmitter location "in the same area."

Mrs. Murphy reaffirmed the truthfulness of these representations when she testified at the hearing.

33. According to Mrs. Murphy, some time between April 1969 and July 31, 1969, when she moved KVAN, she was advised that she was on City of Portland property and was told by city employee B. J. Smith she would have to get off. She also claimed it was Smith who first called her and told her she was on city property. According to Mr. Smith, either Mrs. Murphy or her mother called him and advised that KVAN had been located on city property by mistake and wanted to know if it could be leased. A week later he and a city inspector viewed the city property and observed a house trailer and perhaps a tower nearby (Point 4). He then called Mrs. Murphy and advised her that the city property could not be leased. He also, at Mrs. Murphy's request, wrote her a letter confirming that the city property could not be leased. The letter, which Mr. Smith wrote within a month of the time Mrs. Murphy advised him she was on city property, is dated *March 9, 1970*. Thus, the events described by Mrs. Murphy took place nearly a year after she claimed they occurred; six months after she had moved to her present location (Point 5); and over four months after the Commission specified issues in this proceeding relating to her unauthorized change in transmitter location. Moreover, at the time she advised Mr. Smith, and he thought he observed that she was operating KVAN from the house trailer on city property (Point 4), KVAN was, in fact, operating from its permanent quarters, a converted house, at its present location (Point 5). The record shows that Mrs. Murphy had KVAN in a house trailer during the entire time she operated from the first location on North Portland Road (11805) and also from her second location until she moved into permanent quarters. B. J. Smith

of the City of Portland saw the house trailer at approximately Point 4 when he viewed the property.

34. Mr. William Staley of the telephone company testified regarding Mrs. Murphy's claim that the telephone company also told her she would have to move because one of her antenna poles was too close to the telephone lines. According to Mr. Staley, he drove past the KVAN installation at 11805 North Portland Road and observed that one of the three guy wires to Mrs. Murphy's antenna pole passed over, and within six inches of, the telephone cable. The guy was anchored in the road right-of-way. This presented a safety hazard, in that lightning will jump from one cable to another unless they are separated by at least 36 inches. Except for this one guy wire, Mrs. Murphy's installation posed no problems to the telephone company. Rather than tell her she would have to move KVAN, Staley suggested that she shift her guy wire anchors three or four feet and the problem would be eliminated. Mrs. Murphy promised to do this. However, despite Mr. Staley's efforts, this safety hazard went uncorrected for two or three months. In fact, some time later he drove by the site and observed that Mrs. Murphy's trailer was gone, the guy wire was still in place and the telephone cable had been hacked off.

35. Mrs. Murphy's claim that she was advised by a Commission engineer that she did not need prior Commission authorization to move her station location "in the same area" is false. When questioned about this at the hearing, Mrs. Murphy changed her story. Then she testified that when she talked to a member of the Commission's staff prior to her move in July 1969, he asked her if she had her permit. She, thinking he was talking about city permits including zoning, advised him that she had obtained them.

36. In evaluating Mrs. Murphy's claim that a Commission engineer advised her that it was unnecessary to obtain prior Commission approval for the site move, it is appropriate to consider other written statements made by her with respect to this site move. Thus, in her letter dated July 31, 1969 (the day she moved), Mrs. Murphy, noting a prior telephone conversation with Mr. Proctor, requested permission to move her transmitting facilities. Her amendment to change transmitter location filed August 20, 1969, also referred to her "proposed" change in location. Further, in her September 2, 1969 response to a Notice of Violation following the August 4, inspection, she stated that she had written requesting Commission authorization to change transmitter location but had not received any reply. Later in this same letter, Mrs. Murphy recites that she had attempted to reach someone in authority at the FCC to discuss her problem but had been unsuccessful. Finally, the day before she moved KVAN to its present location (July 30, 1969), she talked by telephone with Mr. Francis McCann, Engineer in Charge of the Commission's Portland Field Office. In that conversation she discussed her impending change in transmitter location. Mr. McCann asked her specifically if the Commission had authorized her move and she told him it had all been taken care of.

37. One other matter in this area relates to Mrs. Murphy specifying the address of 11665 North Portland Road in her August 20 amendment to her pending application to change transmitter location. 11665

comported with her claim, at that time, that her move was less than three-tenths of a mile from her first location at 11805 North Portland Road. When questioned about this, Mrs. Murphy admitted that the address of her present location was always 11197 North Portland Road and she knew this was the case. She then claimed the specification of the new address was simply a "*typographical error.*" However, her letter of July 31, 1969 uses the number 11665 on three separate occasions; the verbal description of the property in her amendment also uses the address 11665; and in the letter dated January 27, 1970, which formally requested that the address of her transmitter location be changed from 11665 to 11197 North Portland Road, the reason given is that the original number was picked arbitrarily and that, in fact, the compound in which the station is located uses the address of 11197 North Portland Road.

OTHER MATTERS RELATING TO ISSUE 4

38. *Mrs. Murphy's program representations.* Following the filing of KVAN's license renewal application on February 3, 1969, the staff sent a letter to Mrs. Murphy requesting, in part, a list and description of her present and proposed public affairs programs on KVAN. In her response, dated April 26, 1969, Mrs. Mruphy stated that commencing the next Saturday a one-hour program entitled "The City of Vancouver—Its Blessings . . . Its Problems" would be broadcast. She also stated a one-half hour Vancouver program would be broadcast starting the week of May 1, 1969. She also stated she played tapes of the voices of men in Vietnam from the Vancouver area. Regarding news programs, Mrs. Murphy stated that while she had no regular news staff, she did have an agreement with Pacific Broadcasting System to broadcast a daily half-hour international news program in the morning plus six five-minute broadcasts in the "PM" seven days a week.

39. When questioned about these programs at the hearing, Mrs. Murphy testified that the "City of Vancouver" program was changed to "Vancouver Roundtable." She testified further that it had been on KVAN for a couple of years, but was not on at least once a month until June 1971. When shown her earlier representation to the Commission, Mrs. Murphy stated that the program had commenced when she claimed in the letter, i.e., the Saturday after April 26, 1969. She also testified that the other one-half hour program commenced as she had represented on May 1, 1969. Mrs. Murphy was then requested to look through KVAN's program logs of April through July 1969 as Bureau counsel had been unable to find these programs, as well as the Vietnam tapes, on the logs. The licensee confirmed that only the Vietnam tapes appeared on the station logs for this period. Moreover, the earliest Mrs. Murphy could establish that the "Roundtable" program was broadcast was a month or two months before Mr. John Barry commenced work at KVAN in early March 1970.

40. Regarding the international news broadcasts, Mrs. Murphy admitted that she had never had a contract with Pacific Broadcasting System and never broadcast any international news programs. Thus, Mrs. Murphy's representations and testimony regarding the public affiairs and news programs broadcast on KVAN were false.

41. *No program and operating logs at KVAN.* On March 12, 1971, the Bureau filed in this proceeding a "Request for Admission of Facts" asking Mrs. Murphy to admit:

> "1) That for all or part of the period September 1, 1970 to mid-February 1971 no program logs were maintained at Station KVAN.
> "2) That for all or part of the period September 1, 1970 to mid-February 1971 no operating logs were mtaintained at KVAN."

42. In response to the Bureau's motion, Mrs. Murphy, on March 18, 1971, denied that program and operating logs had not been maintained during the above period and affirmatively stated program and operating logs were kept on all dates during this period. She also stated that she had in her possession all of the program and operating logs for the period September 1, 1970–February 28, 1971, with exception of five days, November 3, 6, and 10, 1970 and January 29 and 30, 1971.

43. However, when required to produce the logs on April 7, 1971, the following were missing:

a. *Program logs*
1970:
September 15, 27, 28
October 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18
November 3, 6, 10, 19
1971:
January 3, 29, 30
February 20, 21, 22, 23, 24, 25, 26, 27, 28

b. *Operating logs*
1970:
September 3, 12, 15, 17, 28, 29
October 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 22
November 3, 6, 10, 19
1971:
January 29, 30
February 1, 20, 21, 22, 23, 24, 25, 26, 27, 28

Mrs. Murphy acknowledged at the hearing that she had earlier represented that logs for only five days were missing but that when she produced them, less than three weeks later, there were more missing. She claimed she didn't know what happened to them. She also testified that the logs she produced had been filled out by the operators on duty on the day of broadcast.

44. The testimony regarding whether or not program and operating logs were maintained at Station KVAN during all or part of the period September 1, 1970 to mid-February 1971 is in conflict. Mrs. Murphy, as noted, *supra*, testified that the operating and program logs were filled out on the day of broadcast. Two present employees of KVAN testified generally that the logs were always there on the broadcast day for the operators. They could only recall one or two occasions when they were not.

45. On the other hand, two former employees of KVAN, John F. Barry and Donald Nelson, gave detailed testimony regarding this question. Mr. Barry testified that from approximately September 1, 1970 until he left KVAN on December 8, 1970, program and operating logs were not available on numerous occasions. He explained that the station had run out of logs about the beginning of September, and thereafter there were only a few logs provided when Ada Murphy, Mrs. Murphy's daughter, found some extra log forms at home and brought them to the station.

46. Mr. Barry's knowledge in this regard extended beyond his merely working at KVAN as an announcer. It was he, through another firm for whom he worked, who printed the program and operating log forms for the station. Early in September 1970, he brought the need for program and operating log forms to the attention of both Mrs. Murphy and her daughter, Ada. However, they did not provide him with the blank forms he needed in order to print up new ones. After he left the station, sometime in February 1971, before the 22nd, according to Barry, Ada came to him and asked him to print log forms for the station, which he did. Thereafter, on February 22nd Ada called him, told him she had prepared the logs for the days they had had none and asked him to come out to KVAN and sign them. Barry initially agreed to do this, but then after talking to friends decided it would be wrong, so didn't go.

47. Mr. Barry examined the program and operating logs produced by Mrs. Murphy and identified 18 days of program logs and 25 days of operating logs where the signatures purporting to be his were not genuine. The licensee stipulated that the signatures which Mr. Barry identified as not being genuine were, in fact, not his. In addition, Mr. Barry testified that on December 5, 1970, a day no logs were available, he used blank paper to make the required programming and operating log entries in his own hand. Both the programming and operating logs of December 5 purportedly bore Barry's signature. The signatures were not Barry's.

48. Mr. Donald Nelson, former chief engineer at KVAN, also examined the logs produced by Mrs. Murphy. Even though he recalled working three full days as an operator-announcer and several other days on shift or partial shift, his name or signature did not appear on any of these logs. He also testified that on those occasions when he did work as an operator-announcer, no program or operating log forms were available so he kept his logs on a plain sheet of paper.

49. Nelson also recalled advising at least Ada Murphy that the station could be in trouble if log forms were not provided. He also recalled that Mr. Barry had printed new log forms for Ada in about the latter part of January 1971 and being told by her that she was going to go back and make up logs for the past days and have them signed.

50. This conflict in testimony must be resolved in favor of Barry and Nelson. Not only was their testimony more specific, but the licensee's stipulation that Barry's name on the logs was not his signature provides corroboration for his testimony. In this regard, Mr. Barry also testified that he had always signed the logs even if not on the same day and further that he had reviewed past logs while he was still employed at KVAN and could recall no instance where someone else signed his name.

51. Two other matters lend further support to the testimony of Barry and Nelson. Both men detailed their knowledge regarding the printing of the new log forms in late January or early February at Ada's request; her making up logs for past days; and her intention to have these logs, after they had been completed, signed. This testimony was unrebutted and, therefore, must be accepted as true, particularly since these matters concerned Mrs. Murphy's own daughter and she was not called to testify. Finally, the strange disappearance of pro-

gram and operating logs totaling 40 days during the three-week period between the Bureau's motion to produce and their ultimate production which might have offered further substantiation to the testimony of Nelson and Barry is unexplained. It is therefore, found that program and operating logs were not maintained at KVAN during at least part of the period September 1, 1970-mid-February 1971.

KVAN'S CURRENT LICENSE RENEWAL APPLICATION

52. The current license renewal application of KVAN (now a license application) was filed with the Commisison on February 3, 1969, after the station's license had expired. A forfeiture of $200 was imposed for Mrs. Murphy's failure to timely file this application by November 4, 1968. Prior to the Commission's receipt of this application, Mrs. Murphy called Mr. Charles Duvall of the Bureau's Renewal Branch regarding the apparent failure of the Commission to receive her renewal application. In that telephone conversation she advised that her son had mailed the application on November 21, 1968, and that she held the return receipt #2433 for it.

53. Mr. Duvall contacted Mr. Quentin Proctor, Chief of the Bureau's License Division, following this telephone conversation with Mrs. Murphy and a search was begun for the missing application. After searching every possible location for this application without success, Mr. Proctor took the registry number to the Commission's mail room, in hopes that he could discover whether the application had been received and where it had been sent. He was unable to determine either. However, he did locate the envelope bearing registry receipt number 2433. This envelope, which Mrs. Murphy said contained her renewal application, is a small white stationery envelope approximately 7½ inches by 3½ inches. It is too small to have contained even one copy of the renewal application, let alone the required three copies plus a week's program and operating logs.

54. Moreover, in her response to the Notice of Apparent Liability for the late filing of this application, Mrs. Murphy claimed she had received a 90-day extension to file the application and that it had been mailed on the 90th day. Since this application was due to be filed on November 4, 1968, 90 days before the license expired on February 1, 1969, and Mrs. Murphy, by her own admission, did not mail it until the 90th day of her claimed extension, it is clear that she had not mailed it on November 21 as claimed, nor had she mailed it at the time she spoke to Mr. Duvall on the telephone on January 28, 1969, when she advised him she was mailing a copy that day.

55. At the hearing she claimed that her renewal application had been mailed at the end of October or early November 1968. That this was the first and only time she had sent an application to the Commission non-registered. Regarding the envelope of November 21, 1968, she claimed this contained her check for the filing fee. After being confronted with several documents, Mrs. Murphy conceded that her application may have been filed later than late October or early November. However, when shown a letter she had written to Mr. Duvall on January 28, 1969 which stated that she had mailed the application on November 21, 1968, she again reverted to her earlier story stating that the

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letter was inaccurate in that the November 21 envelope contained the fee and that the application had been mailed earlier.

56. Documents cast doubt on the truth of this testimony. On October 30, 1968 Mrs. Murphy sent a wire to the Commission requesting permission to file her license renewal application late. This request was denied by the Commission by telegram on November 1, 1968. The letter enclosing the renewal application which was received by the Commission on February 3, 1969 bears the date November 21, 1968. In that letter she states she was out of town and did not receive the wire until her return. She then completed the enclosed application within 48 hours. That the application was not completed and filed before November 21, 1968 is confirmed by her publication of Notice of Filing in the local newspaper which was published on November 21, 22, 28 and 29, 1968. This notice states that Mrs. Murphy intended to file her renewal application on November 21, 1968. As noted in paragraph 54, *supra*, the application was not, in fact, mailed until a day or two before KVAN's license expired on February 1, 1969.

57. Mrs. Murphy's claim that the November 21, 1968 registered letter contained her filing fee cannot be believed. Her fee was paid by telegram dated February 3, 1969. Further, Mr. Proctor clearly recalled that the fee was paid by wire. Finally, on cross-examination, Mr. Proctor described the internal Commission procedures which would have assured that the payment of the filing fee would have been brought to his attention even if the check was not covered by a letter. He also stated that neither the November 21, 1968 envelope, nor its contents, were brought to his attention in November or December 1968.

PREPARATION OF ENGINEERING PORTION OF MARCH 15, 1971 APPLICATION—ISSUE 5

58. On March 15, 1971, the Commisison received a license application to cover the construction permit involved in the unauthorized change in transmitter location discussed earlier in these findings. It was represented in the application, which was signed by Mrs. Murphy, that the engineering portion of the application, including an attached exhibit, was prepared under the direction of a local consulting engineer, Harold Singleton. The engineering portion itself was signed by William B. Murphy, Mrs. Murphy's former husband.

59. The Bureau, on April 28, 1971, filed a Petition to Enlarge Issues, contending that: (1) the engineering material in the application was based on theoretical data rather than actual measurements; (2) the engineering portion had been prepared by someone other than William Murphy; and (3) the application and engineering had not been prepared under the direction of Harold Singleton. This pleading was accompanied by affidavits of Donald Nelson, former chief engineer at KVAN, and Harold Singleton, the consulting engineer under whose direction the engineering portion was purportedly prepared. Mr. Nelson's affidavit stated that he had prepared the engineering portion of the application on a theoretical basis; described in detail errors he had built into the engineering statement so that it would not be accepted; and described the facts and circumstances under which it had been prepared. The Singleton affidavit categorically denied any participa-

tion, direction, approval or review of the material contained in this application.

60. Mrs. Murphy's Opposition to the Petition to Enlarge attacked the credibility of both of the Bureau's affiants. With regard to the Nelson affidavit, an affidavit was submitted by William Murphy which, in essence, stated that the information contained in the application was based on actual measurements taken after Mr. Nelson had left KVAN and that Murphy had prepared the engineering exhibit attached to the application. The attack on the Singleton affidavit was based on affidavits of employees to the effect that Mr. Singleton was at KVAN during the relevant period doing some kind of engineering work, and facts provided by Mrs. Murphy to the effect that during this period the engineering work at KVAN was the preparation of the license application.

61. In reply, the Bureau submitted the affidavit of Otis Hanson, an electronic engineer and chief of the branch in the Bureau responsible for processing license applications, such as that being considered here. That affidavit was based on an analysis of the engineering portion of this application and supported in every respect the previous affidavit of Mr. Nelson. Moreover, his analysis uncovered a mathematical error on the part of Mr. Nelson which caused him to use an incorrect figure for the electrical height of the KVAN antenna. This had a material effect on the theoretical antenna resistance and reactance values, which would have made it impossible for actual measurements, as claimed by Mr. Murphy, to have reflected the same values.

62. On the basis of these pleadings, the Review Board modified the issues requested by the Bureau to include misrepresentations based on the material contained in KVAN's opposition pleading.

63. When Mrs. Murphy testified at the hearing, she admitted that the engineering portion of the application had been prepared by Mr. Nelson prior to his termination and that the only thing Mr. Singleton had to do with the license application was to pick figures from the engineering portion of the application which had been omitted from the application itself, and that this task was performed after the application was already in her attorney's hands in Washington. Thus, the only factual questions remaining are: (1) whether Mrs. Murphy knew when the application was filed that the engineering material was not based on actual measurements; and (2) whether Mrs. Murphy knew when she obtained Mr. Murphy's affidavit for submission to the Commission in opposition to the Bureau's enlargement petition that it was false.

64. When Mrs. Murphy testified on direct examination she stated that Mr. Murphy was in Vancouver for four or five days in 1971 and that she turned the Form 302 (license application) over to him. While he was there he examined and did things to all the station equipment and in addition did some engineering writing of which she typed part and he typed part. The typing was for the "302" application. She went on to state that when Mr. Murphy left he turned these papers over to her and she forwarded them to her attorney. At other times, she claimed that at the time she filed the application she believed that Mr. Murphy had performed the work and that it was true and accurate. She testified further that she did not learn that it was Nelson's

work until much later, when she talked to Mr. Murphy on the telephone and he advised her that he had only reviewed the material she had given him.

65. However, when questioned on cross-examination regarding what materials for the "302" she had provided Mr. Murphy when he arrived in Vancouver, Mrs. Murphy told a different story. She testified that when Mr. Murphy arrived, the application was complete except for the front pages which she hadn't yet typed. She admitted that she knew at that time that Neslon, not Murphy, had made the purported measurements and states specifically:

> "A. Now, I want to say one thing here. I didn't realize, when Don Nelson worked for me, as I recall, and it is not that vivid, that it was a proof that he was making. When I showed it to Bill he said, 'This is the 302, this is all I need for the 302.'"

She also testified that after she had completed the front part of the license application, she mailed all of the material to Mr. Murphy in Honolulu where he signed it and either returned it to her or forwarded it directly to her Washington counsel. It thus appears that at the time Mrs. Murphy's opposition to the Bureau's petition was prepared and submitted to the Commission, she knew that the material in the license application was prepared by Nelson prior to his termination in early February 1971.

66. The other question remaining is whether Mrs. Murphy knew when the license application was filed that it contained false and inaccurate information. As discussed in the preceding paragraphs, Mrs. Murphy at one time claimed that she believed Murphy had, in fact, made the required measurements after Nelson had left the station or, at the time the application was filed, she believed that the engineering data were based on measurements taken by Nelson.

67. Nelson explained that starting in October 1970 he attempted to prod Mrs. Murphy into having measurements made. Failing in his efforts, he prepared that which is Ex. No. 2 to the license application, on the basis of theoretical calculations rather than actual measurements. Mrs. Murphy typed his draft of this exhibit. Further, Mrs. Murphy knew the material was theoretical. It was prepared with her understanding that it was not to be submitted to the FCC. Mr. Nelson, because he didn't trust Mrs. Murphy, built into the exhibit several errors which he felt certain would prevent its acceptance by the FCC. The errors he identified were confirmed in the Bureau analysis. Finally, according to Nelson, he refused to sign Section II of the license application, because it did not reflect the results of actual measurements.

68. About two weeks after his employment was terminated, Nelson advised Mr. McCann, the Engineer in Charge of the Portland Field Office, of the above matters, because he was afraid Mrs. Murphy would use this material to file with the FCC and didn't want it to reflect adversely on him.

69. Mrs. Murphy's activities and statements during January and February 1971 confirm Nelson's testimony. On January 29, 1971, Mrs. Murphy spoke to Mr. McCann at his office. She advised him that she was preparing her license application, but that her chief engineer (Nelson) had refused to sign the engineering portion. Mr. McCann,

who had understood from earlier conversations that Harold Singleton was going to do the measurement work, suggested that Mrs. Murphy have him sign it. At the close of this conversation, Mrs. Murphy stated that if she couldn't get Mr. Singleton to sign it that she would send it to William Murphy. A few days later Mr. McCann received a call from Harold Singleton and was advised that Mrs. Murphy had asked Singleton to sign the application, but that he had refused because he had not done the work. Mr. Murphy, as discussed *supra*, did sign the engineering portion of the application. Mr. Singleton confirmed that Mrs. Murphy had contacted him in January 1971 and asked him to review and sign the application and that he had refused because he had not done the work. Mrs. Murphy did not tell him who had done the work. Mrs. Murphy claimed to have no recollection of these conversations with McCann and Singleton.

70. In view of the foregoing, it is found that Mrs. Murphy knew that the material in the license application was false when she filed it, and that her testimony regarding a lack of knowledge was not true.

Ultimate Findings and Conclusions

1. The license application for KVAN was designated for hearing under issues relating to: (1) ascertainment of community needs; (2) Mrs. Murphy's failure over the years to file reports and applications on time; (3) an unauthorized change in transmitter location; and (4) whether Mrs. Murphy's conduct has been such that the Commission can no longer rely upon her to fulfill the responsibilities of licensees of this Commission. Subsequently, a misrepresentation issue relating to filing of another license application was added by the Review Board.

ASCERTAINMENT OF COMMUNITY NEEDS—ISSUE 1

2. The findings show that Cathryn Murphy and Robert Ancheta conducted interviews of about 100 persons in Vancouver and the surrounding communities in Washington and Oregon, and that Mrs. Murphy made over 80% of such contacts. The problems and needs elicited from such contacts were assembled and evaluated. After such evaluation, a program format was devised to accommodate the problems and needs of the area. The duration, time and problems to be covered by each program have been shown. Upon the basis of the findings set forth hereinbefore, it is concluded that KVAN has sustained its burden of proof with respect to the ascertainment of community needs issue.

ISSUES 2, 3, 4 AND 5

3. Except for some background information, the findings have been restricted to events which occurred subsequent to 1968 when Mrs. Murphy received her last short-term license renewal for KVAN. If a licensee cannot or will not put its house in order at a time when failure to do so means the loss of its station license, then certainly the Commission cannot expect compliance with its rules and regulations under normal circumstances.

4. The last time KVAN was granted a full three-year license renewal was for the term 1960–63, and this was based on the station's

operation prior to the time Mrs. Murphy became the individual licensee of this station. In February 1968, when the Commission granted KVAN its most recent short-term renewal, it advised Mrs. Murphy:

> ". . . Thus despite our repeated admonitions to you regarding deficiencies in the operation of KVAN, including those brought to your attention when we granted your short-term renewal of license on January 26, 1965, you continue to operate in violation of the Commission's rules. . . . However, since all standard broadcast licenses in the state of Washington expire February 1, 1969, a grant now of your license would be tantamount to a short-term renewal. In view of the fact that such a grant would provide an early opportunity to review your operation of KVAN, we are this day granting renewal of the license of KVAN for the term ending February 1, 1969."

5. Mrs. Murphy's next license renewal application was required to be filed on November 4, 1968. However, in spite of the Commission's admonition, it was not filed until February 3, 1969, after KVAN's license had expired. At this time, Mrs. Murphy claimed she had sent her application by registered mail on November 21, 1968 and even provided a registry number. The record establishes this contention to be false. Further, Mrs. Murphy testified falsely at the hearing when she claimed that she had, in fact, mailed the license renewal application at the end of October or early November 1968, and that the registered letter of November 21, 1968 contained her filing fee. The fee was, in fact, sent to the Commission by telegram on February 3, 1969.

6. In the spring of 1969, the Commission questioned Mrs. Murphy regarding her present and proposed public affairs and news programming on KVAN as revealed in her pending renewal application. A response to this inquiry was obtained only after the Commission threatened to dismiss her application and terminate the operation of KVAN. In that response, dated April 26, 1969, Mrs. Murphy advised, in part, that two public affairs programs totaling 1½ hours a week would commence on or before May 1, 1969. She also advised that she had a contract for and was broadcasting one half-hour and six five-minute international news programs seven days a week. These representations were false. In fact, the earliest Mrs. Murphy could establish that any of the public affairs programs were broadcast was December 1969 or January 1970, seven or eight months later than claimed. Further, Mrs. Murphy admitted at the hearing that she never had a contract for the international news programs and no such programs were ever broadcast on KVAN.

7. On April 1, 1969, Mrs. Murphy filed an application to change transmitter location to 11805 North Portland Road and the Commission granted her temporary authority to operate from this location. On July 31, 1969, Mrs. Murphy moved KVAN 0.7 mile to her present site at 11197 North Portland Road. However, when Mrs. Murphy got around to amending her application 20 days later to specify a new transmitter location, it described a site between 0.1 and 0.3 mile from her original location on North Portland Road. The record establishes that this description was false; that Mrs. Murphy was responsible for this description; and that she had reason to know it was false at the time the amendment was filed.

8. In her written testimony regarding this matter, Mrs. Murphy claimed that she had talked to a member of the Commission's staff and was advised that a change of transmitter location in the same area did

not require Commission authorization. Mrs. Murphy's earlier written statements and correspondence with the Commission regarding this change in transmitter location establish that this alleged conversation never occurred. Moreover, the day before she changed KVAN's location she spoke to Mr. McCann, Engineer in Charge of the Portland Field Office, about her move. When he asked her whether the Commission had authorized it, she lied and told him it had. Thus, it is clear that Mrs. Murphy knew at the time she changed KVAN's location that she needed Commission approval, and even though she did not have it moved the station anyway. Everything that followed were attempts on Mrs. Murphy's part to extricate herself from a situation of her own making.

9. Additional misrepresentations were made by Mrs. Murphy relative to the site question. The record firmly establishes that KVAN has operated at only two locations on North Portland Road. The first at 11805 on the property of the Moore Kiln Company and the second, since July 31, 1969, at its present location, 11197 North Portland Road. The sites described in the August amendment to the application (11665 North Portland Road) were fictitious.

10. In her written and oral testimony at the hearing, Mrs. Murphy claimed for the first time that the primary reason she changed transmitter locations on July 31, 1969 (flooding and safety problems with the telephone company were the others) was that KVAN had been moved by mistake on to City of Portland property, rather than that specified in her April 1969 application. She further claimed that when the City of Portland discovered that KVAN was on its property she was called and told she would have to move. To support this claim, Mrs. Murphy called the real estate agent for the City of Portland, B. J. Smith, to testify on her behalf.

11. Mr. Smith did indeed confirm that when he viewed the City of Portland property, *after Mrs. Murphy had advised him she was there* (paragraph 33), he observed a house trailer or mobile home on the city's property at a location identical with the fictitious location shown in the aerial photograph submitted with the August 1969 amendment. He also testified that at Mrs. Murphy's request he had written her and advised that she could not lease the property and would have to move. Thus, some reason was apparently provided for Mrs. Murphy's unauthorized move. The date of Mr. Smith's letter, *March 9, 1970*, however, revealed the truth regarding this matter.

12. According to Mr. Smith, all of the matters he testified to occurred within a month of the time he wrote the March 9 letter. This was approximately eight months *after* Mrs. Murphy claimed they occurred, six months *after* she had moved KVAN to 11197 North Portland Road, over four months *after* release of the designation order specifying an issue regarding her unauthorized site change, and *after* KVAN had been moved out of the mobile home and into permanent quarters at the present site (11197 North Portland Road). The record shows that KVAN, transmitter and studio, was housed in a mobile home from the time the station was moved to 11805 North Portland Road until permanent quarters were established at 11197 North Portland Road, some time in the early part of 1970. After this hearing was designated on September 30, 1969, Mrs. Murphy attempted to

escape the consequences of her original unauthorized change in transmitter location. In order to do so she moved her empty mobile home on to City of Portland property so that she could obtain independent verification of her false claim. She then called and told the city she was there, and obtained from the city a letter advising her she would have to leave.

13. In the designation order, the Commission expressed its concern regarding the technical operation of KVAN, reciting 122 earlier technical violations and three forfeitures totaling $1,200 as examples, and made it a specific area of inquiry under the ineptness issue. In September 1970, after designation for hearing, KVAN was inspected by the Portland Field Office. One of the principal violations noted was that KVAN had been operating at between 28% and 51% of authorized power during at least the preceding two weeks. Another was the station's modulation monitor which had been inoperative for six months. In her response to the Notice of Violation (submitted 20 days late), Mrs. Murphy claimed her engineer had not logged the low power operation; had advised her the station was running well; and that at the time of her response the station was operating at full power (1,000 watts). At the hearing she reaffirmed the truthfulness of these representations.

14. The evidence of record establishes that these representations were false. Specifically, since July 1970, when serious deficiencies in KVAN's transmitting equipment developed, Mrs. Murphy had repeatedly refused to supply her chief engineer with the proper parts to bring the station up to operating efficiency. The chief engineer had repeatedly advised Mrs. Murphy that KVAN could not achieve full power unless the needed parts were provided. Significantly, a week before KVAN's response to the Notice of Violation was dated, he posted a letter next to his license (a copy was delivered to Mrs. Murphy) disclaiming further responsibility for the low power operation of KVAN. KVAN's low power operation continued into April 1971. It must me concluded that Mrs. Murphy is either unable or unwilling to correct operating deficiencies when brought to her attention.

15. The record establishes that for periods between September 1970 and mid-February 1971, no program or operating logs were available at KVAN. Here again, despite repeated requests from a station employee for a blank log so new forms could be printed, none were provided by the licensee until the end of January or early February 1971. Further, when asked by the Bureau to admit to these failures, Mrs. Murphy filed an affidavit falsely claiming that operating and program logs were always available at KVAN.

16. With regard to the false license application issue (Issue 5), on March 15, 1971 Mrs. Murphy filed a license application to cover the construction permit application involved in the unauthorized relocation of KVAN's transmitter. The record, and Mrs. Murphy's own admissions at the hearing, establish that the engineering material submitted with the application was based on theoretical calculations rather than actual measurements. The record also establishes that Mrs. Murphy knew this material was false at the time she filed the application. Further, in addition to her false testimony regarding lack of knowl-

edge, Mrs. Murphy also caused an affidavit to be filed with her opposition to the Bureau's enlargement request, and herself supplied the facts which she knew to be untrue which were incorporated into that pleading.

17. The following tabulation summarizes Mrs. Murphy's misconduct, false representations and false testimony since she was placed on notice in February 1968 that unless she improved her operation of KVAN she would lose her license:

a. *February 1969:* License renewal application filed after KVAN's station license had expired. Contemporaneous false representations to the Commission and false testimony at the hearing regarding this matter.

b. *April 1969:* False representations regarding current and proposed public affairs and news programs on KVAN.

c. *July 1969:* Unauthorized change in transmitter location. False testimony at the hearing regarding this matter.

d. *August 1969:* Amendment to her pending application to change transmitter location that depicted site locations which Mrs. Murphy knew were fictitious.

e. *February–March 1970:* Deceiving the City of Portland into believing KVAN had been operating from its property when, in fact, it had not. Testifying falsely regarding this matter at the hearing and procuring testimony from the City of Portland which she knew did not describe the true facts.

f. *July 1970–April 1971:* Mrs. Murphy failed to provide the proper parts for the KVAN transmitter, made false representations regarding the technical operation of the station, falsely accused others for these problems, and gave false testimony at the hearing regarding these matters.

g. *September 1970–February 1971:* For part of this period she failed to provide program and operating logs for the station, misrepresented true facts in an affidavit filed with the Commission and testified falsely regarding this matter at the hearing.

h. *March 1971:* Filed a license application which she knew contained false information, procured affidavits and provided information which she knew misrepresented the true facts, and testified falsely regarding these matters at the hearing.

18. The above incidents demonstrate the lengths to which Mrs. Murphy will go to deceive the Federal Communications Commission regarding her own misconduct in the operation of Station KVAN. While the foregoing findings and conclusions relate basically to violations occurring between 1968 and 1971, the record shows that Mrs. Murphy has a history of disregard for the Commission's rules predating 1968 by several years. She attempted to escape blame for any difficulties she encountered by blaming others, such as, the mails, robberies, sabotage, uncooperative employees, to mention a few, instead of accepting responsibility for her own mistakes. Rarely has there been a licensee of this Commission who has been so seriously deficient in the conduct of the affairs of a station as Mrs. Murphy, nor so lacking in candor. Such lack of candor and willingness to fabricate situations require the ultimate conclusion that she does not possess the requisite qualifications to be a licensee of this Commission.

19. Upon the basis of the foregoing findings and conclusions, and the entire record in this proceeding, it is concluded that the public interest, convenience and necessity would not be served by the grant of Mrs. Murphy's application.

Accordingly, IT IS ORDERED that unless an appeal to the Commission is taken by any of the parties or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Cathryn C. Murphy for renewal of license of Station KVAN, Vancouver, Washington, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH, *Hearing Examiner.*

F.C.C. 73-827

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of MUSKEGON CABLE TV CO., MUSKEGON, MICH., NORTH MUSKEGON, MICH. For Certificates of Compliance	CAC-1443, MIO56 CAC-1444, MIO57

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 9, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT.

1. Muskegon Cable TV Company operates cable television systems at Muskegon (Pop. 44,631) and North Muskegon (Pop. 4,234), communities located within the Kalamazoo-Grand Rapids-Muskegon-Battle Creek, Michigan television market (a major television market, ranked #37). Each system has been constructed with 30 channels and the following signals are presently carried by them:

WZZM-TV (ABC, Ch. 13), Grand Rapids, Michigan
WKZO-TV (CBS, Ch. 3), Kalamazoo, Michigan
WOOD-TV (NBC, Ch. 8), Grand Rapids, Michigan
WWTV (CBS, Ch. 9), Cadillac, Michigan
WMVS (Educ., Ch. 10), Milwaukee, Wisconsin
WUHQ-TV (ABC, Ch. 41), Battle Creek, Michigan

On October 19, 1972, Muskegon Cable TV Company filed applications for certificates of compliance to add these three signals to its systems:

WGN-TV (Ind., Ch. 9), Chicago, Illinois
WFLD-TV (Ind., Ch. 32), Chicago, Illinois
WKBD-TV (Ind., Ch. 50), Detroit, Michigan

On January 26, 1973, the applications were amended to request the carriage of a local educational station, WGVC-TV, Grand Rapids, Michigan. In view of the fact that three distant independent television signals will be added, the applicant will provide three separate nonbroadcast access channels to each system pursuant to the requirements of Section 76.251(c) of the Rules.[1]

2. West Michigan Telecasters, Inc., licensee of Station WZZM-TV, Grand Rapids, Michigan, objects to these applications insofar as the signal of WWTV, Cadillac, Michigan will be extended to new customers in Muskegon and North Muskegon, Michigan. Conceding that this signal may be grandfathered to existing customers in these communities, West Michigan states its belief that Section 76.65 does not permit the provision of this signal to anyone else. Muskegon Cable TV Company disputes this interpretation.

[1] One additional channel on each system is devoted to programming originated by these systems.

3. Section 76.65 provides that:

> **The provisions of §§ 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972: Provided, however, That if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart. If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable television system already operating or subsequently commencing operations in the same community may carry the same signals. (Any such new system shall, before instituting service, obtain a certificate of compliance pursuant to § 76.11.)**

Our explication of this rule is found at Paragraph 107 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 141:

> **If carriage of signals has been limited by Commission order to a discrete area of a community, any extension of service outside the discrete area will be subject to the new carriage rules. A cable television system currently operating with authorized signals, and not the subject of such an order, *may freely expand in its community with such signals.* (Emphasis added)**

Since Muskegon Cable TV has never been subject to such a Commission order, it may extend its full complement of existing signals to new customers in its franchised area.[2] Therefore, the opposition of West Michigan Telecasters must be denied.

4. Muskegon Cable TV's request for additional signals is consistent with the controlling signal carriage rule, Section 76.61(b)(2), and, as indicated above, the provision of three separate nonbroadcast access channels in each community satisfies Section 76.251. A grant of these applications would therefore serve the public interest.

Accordingly, IT IS ORDERED, That the applications for certificates of compliance filed by Muskegon Cable TV Company for Muskegon and North Muskegon, Michigan ARE GRANTED.

IT IS FURTHER ORDERED, That the "Objection of West Michigan Telecasters, Inc. (WZZM–TV), Grand Rapids, Michigan," IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[2] These cable television systems, which began service in 1966, presently serve 900 subscribers. Muskegon Cable TV Company purchased the Muskegon and North Muskegon systems from Booth American Company in 1971. In *Fetzer Cable Vision et al.*, 8 FCC 2d 654 (1967), the Commission authorized the carriage of the signal of WWTV on these two systems by Booth American without confining its carriage to any designated area of the communities or restricting its provision to present subscribers.

F.C.C. 73-823

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of PACIFIC POWER & LIGHT CO. For Consent To Transfer of Control of the Following Corporations Holding Domestic Public Radio Licenses or Construction Permits: Evergreen Telephone Co., Northwestern Telephone Systems, Inc., Olympic Telephone Co., Beaver Telephone Co., Cascade Telephone Co., Ilwaco Telephone Co., and Vashion Telephone Co.	File Nos. 8406-C1-TC-(6)-73, 8407-C1-TC-(12)-73, 8399-C1-TC-73, 8527-C1-TC-(2)-73, 8528-C1-TC-(2)-73, 8529-C1-TC-73, 8531-C1-TC-73

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISIONERS H. REX LEE AND REID ABSENT.

1. The Commission has before it the above captioned applications for consent to transfer of control of various subsidiary corporations holding common carrier radio licenses [1] which were filed on May 17, 1973 by Pacific Power and Light Company (Pacific) and Telephone Utilities, Inc. (TU).[2] Continental Telephone Corporation (Continental) filed a petition to deny and a petition to dismiss on June 28 and July 23, 1973, respectively, both of which were opposed by Pacific. William Graper submitted an informal objection.[3]

2. On April 30, 1973, Pacific and TU's Board of Directors entered into an agreement, which is expressly conditioned upon our approval, whereby Pacific would acquire 1,800,000 shares of the authorized,[4] but unissued, common stock of TU in exchange for all of the outstanding shares of Northwestern Telephone Systems, Inc., a Pacific subsidiary. Also, on the same date, Williamette Development Corporation, another wholly owned subsidiary of Pacific, entered into voting trust agreements with several TU shareholders under which it would obtain, upon consummation of the Pacific-TU agreement,

[1] In addition to the above applications, the proposed transaction includes several pending applications involving licenses in the Telephone Maintenance Service. These applications are unopposed and will be acted on at staff level consistent with our decision herein.

[2] Telephone Utilities is applying to obtain control of Northwestern Telephone Systems, Inc., a Pacific subsidiary. This would be a *pro forma* transfer since Pacific would, through this proposal, gain control of TU.

[3] William Graper, beneficial owner of 48,047 shares of the common stock of TU, urged denial of Pacific's applications because the TU Board of Directors is depriving TU shareholders of an opportunity to consider the Continental tender offer and because he believes that Pacific is not capable of improving TU's weak management. These objections are similar to those raised by Continental and discussed below.

[4] TU has 12,000,000 authorized common shares, of which 2,574,492 are presently issued and outstanding.

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the voting rights for approximately 16 percent of the TU shares presently outstanding. Thus, if Pacific is able to consummate its agreement with TU, it will control approximately 51 percent of the TU common shares then to be outstanding. The Public Utility Commissioner of Oregon approved the transaction, noting that Pacific's acquisition of voting control of TU will produce certain operating economics through centralized administration and will allow TU to obtain needed future capital at lower interest rates.[5]

3. Pacific's applications are opposed by Continental which has made a public tender offer to exchange 0.6 of a share of its common stock for each share of the common stock of TU, and 1.25 shares of its common stock for each share of the preferred stock of TU.[6] After obtaining Commission consent, Continental, through its tender offer, acquired approximately 40 percent of the TU shares presently outstanding. Accordingly, on July 19, 1973, Continental demanded a stockholder's meeting to replace the current TU Board of Directors. Citing failure to meet certain requirements, TU's management apparently directed TU's transfer agent not to transfer into Continental's name the shares tendered. It then denied Continental's request for a shareholder's meeting on grounds that Continental was not a shareholder of record.

4. Continental's Petition to Dismiss claims that it is now the controlling shareholder and is therefore revoking the authority of TU's management to join in these transfer of control applications. Continental's Petition to Deny alleges that an evidentiary hearing is required to investigate: (a) the unauthorized assumption of *de facto* control of TU by Pacific; and (b) the fraud and illegality of the proposal which reflect unfavorably upon Pacific's qualifications to be a Commission licensee. To demonstrate the existence of substantial factual issues, Continental cites pending litigation by the Provident Nation Bank of Philadelphia (Provident), Pacific, and Black & Company, Inc. Provident, record holder of 7.8 percent of the presently outstanding TU common stock, has brought an action against TU and Pacific alleging violations of SEC rule 10b–5 and Section 23A.24.030 of the Revised Code of Washington (the state of TU incorporation).[7] Specifically, Provident claims that Pacific entered into an illegal conspiracy with individual officers and directors of TU for the purposes of effectuating a *de facto* merger of TU into Pacific without the vote of TU's shareholders, defrauding TU's shareholders of an opportunity to consider Continental's tender offer, and diluting the value of TU's common stock. In turn, Pacific and TU filed a complaint against Black & Company, Inc., a dealer manager of Continental's tender offer, alleging unlawful solicitation methods and materials.[8] Black & Co. counter-

[5] Order No. 73–304 (May 15, 1973). Pacific submitted a letter dated April 27, 1973 from the Washington Utilities and Transportation Commission stating that the transactions are not subject to its regulatory jurisdiction.

[6] We approved Continental's proposal to acquire a controlling interest in TU by *Memorandum Opinion and Order*, FCC 73–758 (July 20, 1973). In that decision, we determined that the applications of Continental and Pacific were not mutually exclusive and could be considered independently.

[7] *Provident National Bank of Philadelphia* v. *Telephone Utilities, et al.*, United States District Court for the District of Oregon, Civil No. —— (filed May 4, 1973).

[8] *Pacific Power and Light Company, et al.*, v. *Lawrence J. Black, et al.*, United States District Court of the District of Oregon, Civil No. 73–392 (filed May 18, 1973).

claimed, alleging that the Pacific-TU agreement constituted a tender offer in violation of Section 14(d)(1) of the Securities and Exchange Act of 1934. For its part, Pacific denies these allegations, questions whether Continental is a party in interest, and urges (if necessary) a grant of its applications conditioned upon the outcome of the litigation.

5. Before proceeding to the merits of the allegations, we should address Continental's petition to dismiss. Continental seems to argue that because TU has delayed transfer of the shares obtained by Continental under its tender offer, it has some sort of equitable right as a (presumably) controlling stockholder to countermand the action of TU's officers and board in filing these applications in concert with Pacific. Notwithstanding this argument, we hold that Pacific has the right to prosecute these applications with or without the concurrence of TU for the same reasons we held that Continental could prosecute its applications without the concurrence of TU.[9] Therefore, Continental's petition to dismiss will be denied.

6. As a competitor for control of TU and recently as a major shareholder of TU, Continental has interests which would be adversely affected by a grant of these applications. Therefore, we hold it does have standing to file a petition to deny. Also, we believe that Continental's allegation that Pacific engaged in a prior unauthorized *de facto* transfer of control is not substantiated. The Pacific-TU agreement, as well as the voting trust arrangement, are contingent upon Commission approval. Aside from those shares, it appears that Pacific is now able to vote only a small amount of TU stock (about 9.6 percent of presently outstanding shares) which it purchased on the open market. This small amount of stock does not, of course, constitute *de jure* control, and Continental has failed to allege facts sufficient to show that it would constitute *de facto* control. Considering the general distribution of outstanding shares and other circumstances, we cannot conclude that Pacific previously gained *de facto* control over TU.

7. On the other hand, the allegations of corporate and security law violations are not easily resolved. They concern complex factual situations and involve statutes and regulations not within the normal expertise of this Commission. It is likely that some of these matters may have to be referred for comment to other regulatory bodies, e.g. the Securities and Exchange Commission. Despite the time consuming nature of such an investigation, we are of the opinion that these allegations have a bearing on the qualifications of Pacific and therefore must be resolved prior to taking final action on its applications.

8. However, in acting on the Continental applications without considering Pacific's we recognized the disadvantage to which Pacific would be subjected and indicated that Pacific's applications would be acted upon as expeditiously as possible. Under ordinary circumstances, we would not act upon Pacific's applications until the corporate and security law questions raised had been resolved. But to delay under the extraordinary circumstances of this case would be tantamount to a denial in view of Pacific's competitive position *vis a vis* Continental. Even if we should conclude later that the charges against Pacific are

[9] See footnote 6, *supra*.

not substantial and that a grant of Pacific's applications are proper, it is probable that Continental would have gained control of TU without contest. This would be unfortunate since our regulatory processes would have been used to defeat effectively a qualified entity in a legitimate struggle for corporate control. Therefore, to preserve Pacific's position *vis a vis* Continental and to prevent the use of our procedures and processes to determine the substantive results of the contest, we believe the situation demands some form of extraordinary action.

9. One possibility is, as suggested by Pacific, a grant conditioned upon the outcome of the various litigation as noted above. The Commission has done this in several other cases, usually those involving civil antitrust actions. However, unlike the instant situation, those cases involved questions where all the relevant matters were before a court of competent jurisdiction. In this case, the pending litigation involves only part of the issues before the Commission. Therefore, we conclude that such a conditional grant would not discharge our obligations under Section 310(b) of the Communications Act.

10. Inasmuch as Pacific's plan involves the exchange of two large blocks of stock (i.e., 96,000 shares of Northwestern for 1,800,000 shares of TU) and the use of a voting trust, it appears that the transaction is of such a nature that it could be subsequently reversed if necessary. Accordingly, we have decided, in light of the unusual circumstances of this case, that the best course of action is to give Pacific interim authorization to exchange the stock in question and to exercise the voting trust, pending final Commission action on the captioned applications. This will permit Pacific to proceed with its proposal in order to participate in the struggle for corporate control of TU. However, this interim authority is specifically conditioned as follows: pending final action upon these applications, Pacific may not directly, indirectly, or in concert with TU, initiate, approve, countenance or concur in any substantial corporate changes to TU, if it does in fact gain control of TU. We wish to emphasize that this interim authority is without prejudice to our final disposition of these applications, and if they are ultimately denied, Pacific (and TU) will be required to reconvey any stock involved in this proposal. We reiterate again that our sole purpose in taking this action is to maintain parity between the competitive efforts of these contending parties in an unusual situation for which there are no exact precedents.[10] Accordingly, our action herein should not be construed directly or indirectly as indicating any finding or conclusion on the relative merits of the issues being litigated or to be decided by final action upon these applications.

11. Continental requests that we delay the effective date of any authorization granted to Pacific so that it may seek a stay in connection with reconsideration or judicial review of such action. Continental claims that this unusual request is necessary to prevent immediate consummation of the disputed Pacific-TU stock transaction, thereby prejudicing Continental's position and effectively blocking its attempt

[10] Although the granting of interim authority is unusual in actions taken under Section 310(b), it is considered to be within the power of the Commission. Section 310(b) specifically empowers the Commission to authorize the transfer of rights under a license (i.e. something less than the whole). Moreover, we believe that the Commission has inherent power to authorize less than that requested in the application, where the public interest so dictates.

to gain control. However, we are not convinced as to the necessity of such an extraordinary measure. If indeed Continental is successful on appeal or reconsideration, the limited transaction we authorize here can be reversed without any apparent significant injury to either Continental or the public interest.

12. Accordingly, IT IS HEREBY ORDERED that Pacific Power and Light Company IS GRANTED INTERIM AUTHORITY to acquire the stock of, and the voting rights to the stock of, Telephone Utilities, Inc. as described in the captioned applications, pending and subject to final action upon said applications; *Provided, However*, that if said proposal results in control of TU, Pacific shall not vote the TU shares (or rights therein) so acquired in support of: (a) any substantial change in TU's management, operations, and corporate practices; (b) any sale of TU's assets other than in the regular course of business; (c) any merger or consolidation of TU with any other company; and (d) any other corporate act of TU which requires stockholder approval; and *Further Provided*, that Pacific shall not dispose of any TU stock or voting rights acquired pursuant to this interim authority.

13. IT IS FURTHER ORDERED that Continental's petition to dismiss IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-862

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k) OF THE COMMISSION'S RULES) FOR THE DEMOCRATIC NATIONAL COMMITTEE TELETHON ON SEPTEMBER 15, 1973, BY NATIONAL BROADCASTING CO.

MEMORANDUM OPINION AND ORDER

(Adopted August 8, 1973; Released August 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT AND STATING: "SEE MY STATEMENT ATTACHED TO MEMORANDUM OPINION AND ORDER, FCC 72-547, 35 FCC 2D 770." COMMISSIONER ROBERT E. LEE DISSENTING; COMMISSIONERS H. REX LEE, REID, AND HOOKS ABSENT.

1. The Commission here considers a Request for Waiver filed July 16, 1973, by National Broadcasting Company, Inc. (NBC), for waiver of the prime time access rule, Section 73.658(k) of the Commission's Rules, in order that it may present the Democratic National Committee Telethon Saturday, September 15, 1973. The planned telethon would begin at 7:00 p.m. Eastern time and continue until 11:00 p.m. Eastern time. The 11:00 to 11:30 time period will be returned to the stations for local use. The telethon will then resume at 11:30 p.m. and continue until 1:00 a.m. Eastern time. Scheduling arrangements for stations in the Mountain and Pacific time zones are not yet finalized; however NBC contemplates that the four hours of prime time in each zone will be occupied by network programs.[1]

2. In support of its request, NBC asserts the following considerations:

(a) The public interest would be served by granting this waiver in that the Democratic Party would be utilizing broadcast facilities to broaden the base of political contributions.[2]

(b) The requested waiver is of limited scope, involving one additional hour of prime time broadcasting by a network on only one day.

(c) The program is to be presented nationwide and is of special importance and viewer interest.

(d) Because of the large expenditure required for a telethon, it is necessary to use extended broadcast periods. In this instance, the utilization of four consecutive hours of prime time is of critical importance to the success of the fund raising efforts.

[1] The Democratic Telethon will be the only network program to be broadcast by NBC during prime time on the evening of September 15. During the thirty minute break between 11:00–11:30 E.T., 8:00–8:30 P.T., the West Coast stations may choose to carry *NBC Nightly News* on a delayed basis.

[2] NBC cites the *letter to M. C. Smith*, 40 FCC 549 (1963).

(c) If this waiver is granted there will be no measurable impact upon producers and suppliers of prime time access period programming, and hence, it will in no way affect the primary purpose of the prime time access rule.

3. NBC asks that the Commission consider this request on an expedited basis because production and scheduling plans need to be completed at the earliest opportunity.

4. Certain questions concerning this request were raised by *Hughes Sports Network, Inc.* (Hughes), in a letter of July 20, 1973, and a meeting of the three interested parties, called by the Commission staff and held on August 4, 1973, and a second letter from Hughes dated August 7. The problems involved chiefly relate to the fact that the contemplated Telethon date, September 15, is also the date scheduled by the Hughes network for the first telecast in the 13-week *America* series, for which it has lined up a substantial lineup of stations, including some NBC affiliates. If the latter carry the Democratic telethon starting at 7 p.m. E.T., they will not be able to carry the *America* program at 7 p.m. or later that evening; it is stated in the July 20 letter that thus the Telethon would preempt the Hughes program on 9 stations in the 51st through 100th markets.[3]

5. The significant points covered in the Hughes letters and the meeting mentioned may be summarized as follows:

(a) The July 20 letter urges that if there is an alternative time period acceptable to the Democratic Committee, this should be given consideration. It appears that there is none; ever since about July 10, the Telethon date has been regarded as settled, and extensive plans for promotion, fund-raising dinners, etc., have been tied to the date. (It appears that the date of September 15 was picked by the Committee as the most suitable (also the latest) of 3 dates offered by NBC).

(b) The July 20 letter also suggests that—aside from the *America* problem—Hughes as a network, even though one exempt from the rule, should be considered for use by parties seeking to present programming on a national basis which exceeds three hours in an evening. However, Hughes recognizes that this is a consideration for the future, rather than in the present case; here, it is too late, given the necessity for at least some advance planning, to put together a different network for September 15. Counsel for Hughes asked at the meeting that the Commission make it clear for the future that in waiver requests by the national networks, or parties seeking to use them, it must be shown that parties have explored the possibility of using "occasional" networks such as Hughes, which are exempt from the rule, and why they have not chosen this course.

(c) The Hughes *America* telecast, while it is a "network" program in the sense that Hughes furnishes the program and the advertising support, and plans promotion on the basis of simultaneous telecast, is not a "live network feed" using interconnection facilities. Rather, each station in the lineup is sent a videotape to use. Thus, as far as the physical presentation of the program is concerned, there is no inconvenience or added cost to stations involved in presenting the *America* series at one time as compared to another.

(d) In its letter of August 7, Hughes renews its requests for waiver of the "off-network" restrictions of the rule with respect to *America*. It is pointed out that the policy of withholding action on such requests, pending the overall rule deci-

[3] As the July 20 letter points out, Hughes was denied immediate grant of waiver of the prime time rule's "off-network" restriction for the *America* series (necessary because the material is off-NBC) because of the Commission's policy of granting no new waivers of that provision pending overall decision in the prime-time access rule proceeding (Docket 19622). See *Hughes Television Network* et al., 40 FCC 2d 139, released March 26, 1973. Therefore it put together a lineup for the *America* program which complies with the rule, including in the top 50 markets some independent stations, some affiliated stations from 6 to 7 p.m. E.T. on Saturdays, and some affiliated stations which will preempt network programs to carry *America* from 8 to 9 p.m. E.T. Outside of the top 50 markets, its lineup consists almost entirely of stations which will present the program at 7 p.m. E.T. on Saturdays, including the 9 NBC stations mentioned in the text.

sion, was adopted several months ago, when it appeared that a decision would be forthcoming in the spring or early summer; and that since no decision has been forthcoming, this policy and our earlier *America* decision should be reviewed, and the waiver request granted at this time. At the meeting, it appeared that, while Hughes has put together a lineup on the basis mentioned in footnote 3, above, there are still a few of the top 50 markets where it has not made arrangements in the absence of a waiver, and waiver would be helpful in these cases.

DISCUSSION AND CONCLUSIONS

6. Upon consideration of the foregoing matters, we are of the opinion that the NBC-Democratic Committee waiver request for September 15 should be granted. Clearly, this would be true in the absence of the matters raised by Hughes and set forth in paragraphs 4–5, above, in light of the nature of the proposed Telethon programming, the "one time" nature of the request and thus the minimal impact on prime-time availability to non-network program material, and the 1972 precedent cited by NBC and noted above. The matters raised by Hughes do not appear to afford substantial reason for denial (and, indeed, Hughes has not specifically asked that the request be denied). As noted above, the September 15 date for the telethon is not one which could be regarded as subject to change, and Hughes does not urge that at this point in time its potential as an alternative "network" could realistically be regarded as a feasible possibility. Since the Hughes *America* program will be made available to stations in videotape form, it does not appear that there is any substantial inconvenience involved, to those of them which are also NBC affiliates, in using the program on another night if necessary to accommodate the full telethon presentation. The fact that waiver of the "off-network" restriction was not previously granted to Hughes does not appear directly pertinent to the decision in the present matter, since, if anything, it could have resulted in more NBC-affiliated stations being affected by the Telethon proposal than is the case now.

7. With respect to Hughes' requests as to the future, it may be that more attention than hitherto should be paid to the impact of waiver in cases such as that involved here—which are not numerous—on the operation and development of "occasional" networks such as Hughes. We will consider this aspect of the whole subject when the need for it arises in particular cases. As to Hughes' own request for waiver of the "off-network" provisions of the rule—recently renewed in its letter of August 7—we will consider and take appropriate action on this in the near future.

8. In view of the foregoing, IT IS ORDERED, That the prime time access rule, Section 73.658(k) of the Commission's Rules, is waived in order that stations owned by, or affiliated with, The National Broadcasting Company, Inc. (NBC) may present, on Saturday, September 15, 1973, four hours of network programming; PROVIDED, that all such network material shall consist of the Democratic National Committee Telethon or the *NBC Nightly News*.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-852

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS BY AMERICAN BROADCASTING COMPANIES, INC., FOR WAIVER OF THE PRIME TIME ACCESS RULE IF NECESSARY FOR SPORTS "RUNOVERS"

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. The Commission here considers a "Request for Sports Runover Waivers", filed on July 26, 1973, by American Broadcasting Companies, Inc. The request is for waiver of the prime time access rule, in case it should be necessary, to accommodate possible "runovers" after 7 p.m. E.T. in the case of two forthcoming events: the Sunday (final) round of the National PGA Golf Tournament, from Cleveland, on August 12, and a West Coast professional football game on Saturday, September 15. The request is for waiver to carry these events to completion (if that should occur after 7 p.m. E.T.) plus the usual three hours of regular network programs the same evening.

2. It appears that the scheduling of the telecasts has been reasonably arranged to avoid the possibility of runover in the normal course of events, with the golf coverage scheduled to end at 6:30 p.m. E.T. (and with no possibility in this event of a "sudden death" playoff the same day), and with the football coverage scheduled from 3:30 to 7 p.m. E.T., allowing three and a half hours, which should be adequate in the absence of unusual circumstances. Accordingly, in light of "footnote 35" of the May 1970 Report and Order adopting the rule, and Commission decisions since, waiver appears warranted to cover the rather remote possibility of a runover.

3. Accordingly, IT IS ORDERED, That waiver of Section 73.658(k) of the Commission's Rules, the prime time access rule, IS GRANTED, to stations affiliated or under common ownership with the American Broadcasting Companies, Inc. television network, to carry to conclusion the telecasts of the National PGA Golf Tournament on Sunday, August 12, and a professional football game on Saturday, September 15, plus three hours of regular ABC programs the same evening, provided the coverage of the golf tournament is scheduled on the basis of ending about 6:30 p.m. E.T., and the football telecast begins no later than about 3:30 p.m. E.T.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary*

F.C.C. 73-808

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF SPRINGFIELD TELEVISION BROADCASTING CORP., LICENSEE OF STATION WRLP, GREENFIELD, MASS.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released August 1, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated August 29, 1972, addressed to Springfield Television Broadcasting Corporation, the licensee of Television Station WRLP, Greenfield, Massachusetts, and (2) the licensee's reply to the Notice of Apparent Liability received by the Commission on September 25, 1972.

2. The Notice of Apparent Liability in this proceeding indicated that the licensee was subject to apparent liability for forfeiture in the amount of one thousand dollars ($1,000) for willful or repeated violations of Sections 73.672(a)(3)(i) and 73.690(a) of the Commission's Rules by failure to make and log daily frequency checks from September 1, 1971 to December 21, 1971.

3. In responding to the Notice of Apparent Liability, the licensee denies any willfulness but admits that the daily frequency checks were not made and logged as indicated in the Notice, attributing such failure to its lack of knowledge that such checks were required to be made and logged pursuant to Sections 73.690(a) and 73.672(a)(3)(i) of the Commission's Rules. Station WRLP is operated as a 100 per cent satellite of Station WWLP, Springfield, Massachusetts. The licensee states that no mention or reference to the making or logging of daily frequency checks is made in Section 73.676 of the Rules which is entitled "Remote Control Operation" and that if reference to the specific provisions requiring daily frequency checks had been mentioned therein then the station would have complied by making the daily checks. The licensee acknowledges that Section 73.672(a)(3)(i) refers to its applicability to the frequency checks required by Section 73.690(a) of the Rules but states that Section 73.690(a) is also devoid of any mention or reference to its applicability to remote control operations. The licensee also refers to frequency reports concerning monthly frequency measurements made by an independent monitoring firm indicating operation within frequency tolerance, which reports were submitted with the licensee's reply to the Notice of Violation heretofore in this proceeding.

4. In essence, all of the foregoing matters were considered by the Commission before adopting the Notice of Apparent Liability. Particularly, the Notice stated that the monthly frequency reports (made by Cambridge Crystals) indicated that the measured frequency was well within the authorized tolerances when made. However, failure to make daily checks may result in operation beyond frequency tolerance during the 30 day period between frequency measurements made by the outside services. Additionally, in seeking mitigation, the licensee cites its efforts pertaining to the pioneering UHF television service to the WRLP service area. The licensee denies that the violations were willful and requests total remission or substantial reduction of the amount of forfeiture.

5. Licensees are expected to know and comply with the Commission's Rules, *J. C. Johnson, tr/as Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970) and a misinterpretation of the Rules will not relieve a licensee of liability. *Hanson R. Carter*, 23 FCC 2d 511 (1970). The Remote Control Operation Rule (Section 73.676) is primarily devoted to provisions for telemetry, control, and test functions at the control point. Although the Section makes no specific reference to Sections 73.672(a)(3)(i) or 73.690(a) of the Rules, the section makes general reference to the requirements for compliance with all of the rules under Subpart E of which Sections 73.672(a)(3)(i) and 73.690(a) are a part. See Sections 73.676(a)(3) and 73.676(g).

6. We have considered all matters set forth in the licensee's response to the Notice of Apparent Liability for forfeiture and we find that the licensee repeatedly violated Sections 73.672(a)(3)(i) and 73.690(a) of the Commission's Rules by failing to make and log daily frequency checks from September 1, 1971 to December 21, 1971. We further find that the licensee has not provided reasons for the violations which would merit rescission, remission, and mitigation of the forfeiture. Having found that the violations were repeated, it is unnecessary that we make an additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375.

7. In view of the foregoing, IT IS ORDERED, That Springfield Television Broadcasting Corporation, the licensee of Television Station WRLP, Greenfield, Massachusetts, FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated violation of Sections 73.672(a)(3)(i) and 73.690(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Springfield Television Broadcasting Corporation, the licensee of Television Station WRLP, Greenfield, Massachusetts.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-754

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request Concerning
EXTENSION OF TIME TO FILE COMMENTS IN CONNECTION WITH ASSIGNMENT OF LICENSES OF STATION KTW-AM AND FM, SEATTLE, WASH.

JULY 13, 1973.

BENEDICT P. COTTONE.
Suite 1730 M Street NW.,
Washington, D.C. 20036.

DEAR MR. COTTONE: This is with reference to your letter dated July 2, 1973 in which you request an extension of time from July 6 to July 26, 1973 within which to file comments on information supplied by Sterling Theatres Company in connection with the pending applications to assign the licenses of Stations KTW-AM and FM, Seattle, Washington.

By letter dated June 14, 1973, the Commission requested Sterling to submit additional information concerning anti-trust violations and concentration of control matters. That letter also provided that objectors, including your clients, would be afforded 10 days within which to respond to the Sterling Submissions. By cover letters dated June 22 and 26, 1973 Sterling submitted the information requested by the Commission which include over 130 pages of written material as well as the entire transcript of the case *Anderson* v. *Sterling Theatres Company* totalling 28 volumes.

Your request for the extension of time is based on the amount of material submitted by Sterling. Sterling and Counsel for the Receiver have opposed your request principally on the ground that if the extension is granted, the Commission will be unable to act prior to the present contract termination date of July 31, 1973.

The request and oppositions have been considered and it has been determined that in light of the extensive nature of the filing some relief is warranted. Therefore, your request for extension of time has been granted to the extent that the time for filing comments on the Sterling submissions has been extended to and including July 20, 1973.

Chairman Burch absent; Commissioner Johnson concurring in the result; Commissioner Wiley not participating.

By direction of the Commission.

VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-826

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
THETA CABLE OF CALIFORNIA, ONTARIO, CALIF.	CAC-727 CA463
THETA CABLE OF CALIFORNIA, UPLAND, CALIF.	CAC-728
THETA CABLE OF CALIFORNIA, PORTIONS OF SAN BERNADINO COUNTY, CALIF.	CA464 CAC-729 CA465
THETA CABLE OF CALIFORNIA, MONTCLAIR, CALIF.	CAC-730 CA466
For certificates of compliance	

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 9, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. On June 28, 1972, Theta Cable of California filed the above-captioned applications for certificates of compliance for new cable television systems to operate in the Los Angeles-San Bernadino-Corona-Fontana, California market (#2) with a minimum of 28 channels capacity, and to carry the following television broadcast signals:

KNXT (CBS), Los Angeles, California
KNBC (NBC), Los Angeles, California
KTLA (Ind.), Los Angeles, California
KABC-TV (ABC), Los Angeles, California
KHJ-TV (Ind.), Los Angeles, California
KTTV (Ind.), Los Angeles, California
KCOP (Ind.), Los Angeles, California
KWHY-TV (Ind.), Los Angeles, California
KCET (Educ.), Los Angeles, California
KMEX-TV (Spanish, Ind.), Los Angeles, California
KHOF-TV (Ind.), San Bernadino, California
KLXA-TV (Ind.), Fontana, California
KBSC-TV (Ind.), Corona, California
KVCR-TV (Educ.), San Bernadino, California

On September 12, 1972, Theta filed a "Petition For Special Relief and

Waiver Of Rules" in which it requests partial waiver of Section 76.251 of the Commission's Rules.[1]

2. Theta seeks partial waiver of Section 76.251 to allow it to furnish on each of the proposed systems: a total of four channels for local educational purposes, one channel for use by each of the respective municipal authorities, and one public access channel to be used on a time-shared basis. In support of its request, Theta states that the franchising ordinances (all of which were granted before March 31, 1972) requiring this access proposal was developed by Theta, a joint committee composed of representatives of each community,[2] and personnel from the local educational authorities. With respect to the limited public access channel proposal, Theta argues that the areas to be served are part of the "Pomona Valley Area" where there is a strong community of interest between the residents, and therefore less need for separate public access channels. The government access channel has been designed to allow the local governments to communicate over the channel in a manner which confines the signal to their respective communities. With respect to the need for the additional educational access channels, Theta points out that the area in question is served by three "unified school districts" and as such the local governments feel there is a need for each school district to have at least one channel for its own access purposes.

3. We stated in Par. 81, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 355, that educational access is a new type of service, and that we would entertain petitions for additional channels upon petition from the franchising authority and the cable system when they wish to experiment with additional designated channels on a free basis. In the present case, the franchising authorities have not explicitly requested the variances. Nonetheless, we note that all of the franchises involved were granted before March 31, 1972,[3] so that the issue for present decision is whether to grant a waiver to approve the present proposal which the parties nego-

[1] Section 76.251 of the Rules provides, in pertinent part, as follows:

(4) *Public access channel.* Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel. See also § 76.201;

(5) *Education access channel.* Each such system shall maintain at least one specially designated channel for use by local educational authorities;

(6) *Local government access channel.* Each such system shall maintain at least one specially designated channel for local government uses:

[2] The total number of homes in this area is approximately 41,500. Assuming a 50% penetration, the maximum number of homes to receive service would be approximately 20,000.

City	Total homes	Total CATV plant miles
Ontario	21,000	160
Montclair	8,000	40
Upland	9,500	65
Portions of San Bernadino County	3,000	30

[3] Ontario franchise was granted in May, 1971. Upland franchise was granted in September, 1971. Montclair franchise was granted in May, 1971. San Bernardino County franchise was granted in February, 1966.

tiated before our present rules were available to them. It appears that the applicant could comply fully with our access rules if we ordered less educational access and more public access. In these circumstances, we are reluctant to substitute our judgment for that of all of the interested parties, and believe it desirable to allow a reasonable opportunity to experiment. Consequently, we will waive Section 76.251 of the Rules until March 31, 1977, in order to allow the present proposal to go forward. In 1977, we will consider whether to extend the waiver further based on the results of the experimental operation.

4. Aside from the access provisions of the franchises, discussed above, they are not in full compliance with Section 76.31 of the Rules since the franchise fee is 5% of gross annual receipts from operations, there are no provisions covering the construction schedule, and there is no statement to establish that there was a public proceeding prior to the franchise award. Theta states in its applications that its qualifications were considered at a public hearing, and that it will construct the system within the times specified by the rules. The franchises were granted prior to March 31, 1972, and therefore according to the Note following Section 76.13(a)(4) of the Rules need only show substantial consistency with Section 76.31 of the Rules until March 31, 1977. We find the deviations described above to be relatively minor, and therefore find substantial consistency sufficient to grant these applications until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition For Special Relief and Waiver Of The Rules" filed September 12, 1972, by Theta Cable of California IS GRANTED, and that Section 76.251 of the Commission's Rules IS WAIVED with respect to the above-captioned applications to the extent indicated above.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–727, CAC–728, CAC–729, CAC–730) ARE GRANTED, and that appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-816

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
UNITED TELEVISION COMPANY, INC. (WFAN-TV), WASHINGTON, D.C. For Renewal of License	Docket No. 18559 File No. BRCT-585
UNITED TELEVISION COMPANY, INC. (WFAN-TV), WASHINGTON, D.C. For Construction Permit	Docket No. 18561 File No. BPCT-3917
UNITED BROADCASTING COMPANY, INC. (WOOK), WASHINGTON, D.C. For Renewal of License	Docket No. 18562 File No. BR-1104
WASHINGTON COMMUNITY BROADCASTING CO., WASHINGTON, D.C. For Construction Permit for New Standard Broadcast Station	Docket No. 18563 File No. BP-17416

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 8, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, WILEY AND HOOKS CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. The Commission has before it for consideration: (a) Orders, FCC 73-371, 40 FCC 2d 472, and FCC 73-372, 40 FCC 2d 474, both released April 9, 1973, directing United Television Company, Inc., and United Television Company of Eastern Maryland, Inc. (hereinafter referred to collectively as "United"), to resume the operation of television stations WFAN-TV, Washington, D.C., and WMET, Baltimore, Maryland, respectively; (b) petitions for reconsideration of (a), above, filed May 9, 1973, by United; (c) oppositions to (b), above, filed May 23, 1973, by the Chief, Broadcast Bureau; (d) comments on (b), above, filed May 22, 1973, by Washington Community Broadcasting Co.; and (e) replies to (c), above, filed June 7, 1973, by United.

2. By Orders, FCC 72-112 and FCC 72-185, released February 14 and February 24, 1972, respectively, we authorized United to suspend operation of television stations WMET, Baltimore, Maryland, and WFAN-TV, Washington, D.C., until 15 days after the release date of our action on a petition for reconsideration of the designation order in the proceeding in which WMET's qualifications as a licensee are in question. That petition was denied,[1] and United subsequently requested authority to continue to remain silent for such a period of

[1] *United Television Company of New Hampshire*, 38 FCC 2d 400, released December 4, 1972.

time as would allow us to act on applications for assignment of license of these stations. These requests were also denied,[2] and United was ordered to resume the operation of these stations.[3] Presently before us are United's petitions for reconsideration of those orders.

3. In its petitions, United points out that, while we were considering its requests for authority to continue to remain silent, Administrative Law Judge Forest L. McClenning released an Initial Decision in this proceeding,[4] in which he concluded, *inter alia*, that United possesses the requisite qualifications to remain the licensee of Station WFAN–TV, and that the public interest, convenience and necessity would be served by granting United's applications for renewal and improvement of the WFAN–TV facilities. This conclusion was conditioned, however, on the requirement that United dispose of its interest in television station WMET.[5] United thus argues that our Orders requiring *both* WFAN–TV *and* WMET to return to the air are inconsistent with the Presiding Judge's condition that WMET be sold. United also alleges that our Orders are basically unfair and violative of administrative due process in that they would require United (a) to resume operation of WFAN–TV with its old, inadequate facilities while forbidding their improvement,[6] and (b) to incur substantial expenses to return WMET to the air although it will not be able to retain that station.[7] United also emphasizes the "severe financial drain" which would result from our Orders, alleging that it could not afford the "staggering losses" which those Orders would assure.

4. United next asserts that, as an "unlicensed operation" with no assurance as to when, or if, it will receive a license renewal, it will be "near impossible" to secure the necessary staff to operate its facilities properly or to enter into long-term programming contracts. United submits that, if it chooses to turn in its licenses and if we accept new applications and hold comparative hearings, approximately four years would elapse before the public would receive a new service. This, United observes, does not comport with our stated objective of returning these stations to operation "at the earliest possible time." United argues that the choice we have given it, either to return these stations to the air or to turn in its licenses, is illusory. United represents that it is "ready, willing and able" to return WFAN–TV to the air if we will simply allow it to do so. United states that it is ready to undertake immediate construction, as authorized by the construc-

[2] FCC 73–371, 40 FCC 2d 472, and FCC 73–372, 40 FCC 2d 474, both released April 9, 1973.

[3] The effectiveness of this requirement has been stayed pending our consideration of these petitions for reconsideration. FCC 73–612 and FCC 73–613, both released June 12, 1973.

[4] FCC 73D–7, released February 22, 1973.

[5] United notes, in addition, that the Presiding Judge withheld final action in this proceeding pending dispositive action in the other proceedings in which United is involved. See Docket Nos. 19336–19338; 19412; and 19664.

[6] United claims that a comparison of WFAN–TV's authorized facilities with those of other Washington, D.C., stations shows a smaller predicted coverage, and that actual operation revealed severe shadowing effects. Thus, United avers, WFAN–TV does not provide a viable signal, and it would be impossible for it to survive economically.

[7] United maintains that WMET's coverage was approximately one-third that of the other Baltimore television stations and that the combination of the Presiding Judge's divestiture requirement with our Orders would result in United's operation of WMET as a "caretaker" only.

104–006—73——8

tion permit granted by the Presiding Judge, and that it will place the station on the air at the earliest possible time. United thus requests:

> (a) that it be allowed either to divest itself of WMET as required by the Presiding Judge or to remain silent until resolution of the hearing involving WMET; and
>
> (b) that the applications for renewal of license and construction permit to improve the facilities of WFAN–TV, granted by the Presiding Judge, either be permitted to become effective immediately, or that it be authorized to remain silent until these grants become effective.[8]

5. In support of its requested relief, United cites *RKO General, Inc.*, FCC 72–1201, 26 RR 2d 228 (1972), in which we granted the assignment of WAXY–FM to RKO General although RKO was at that time in hearing status concerning its character qualifications for other stations. United notes that the assignment was granted, "subject to whatever action the Commission may deem appropriate following resolution of the matters [in hearing]." United claims that the instant case exceeds *RKO General* in public interest considerations, since United is an existing licensee and there is an outstanding grant of the renewal and construction permit applications by the Presiding Judge. In addition, United argues that we have previously approved the sale of WJMY(TV), Allen Park, Michigan, another United station, subsequent to the initiation of the hearings involving WFAN–TV and WMET, where no profit was realized and the sale facilitated commencement of service on the channel.[9] In this connection United represents that it would agree not to profit from the sale of WMET and that it would remain subject to the Commission's jurisdiction through its other broadcast ownership interests should it be found to have been guilty of any wrongdoing.[10]

6. In its oppositions, the Broadcast Bureau first notes that United's petition is based in large part on the Presiding Judge's Initial Decision proposing a grant of the WFAN–TV applications. The Bureau argues that this decision cannot be made effective immediately because it is not final and is subject to review. The Bureau states that it intends to file exceptions to the Initial Decision and, specifically, to that portion granting the WFAN–TV applications and thus that a grant of United's request would foreclose it from filing those exceptions. The Bureau next alleges that United's argument that the applications may be granted at this time, subject to sanctions at a later date, is contrary to Section 309(e) of the Communications Act in that United's qualifications to remain a licensee must be established *before* its applications can be granted. Further, the Bureau submits that United's dilemma is of its own making and stems from the alleged wrongdoing of its own principal. Thus, the Bureau maintains, United's requested relief is "totally inappropriate."[11]

[8] In this manner, United concludes, Washington, D.C., would receive a full and effective service from WFAN–TV at the earliest possible time, and WMET would also be returned to the air by a new licensee.

[9] See *United Broadcasting Co., Inc.*, 35 FCC 2d 355 (1972).

[10] In this connection, United cites *Watkins Glen-Montour Falls Broadcasting Corp.*, 20 FCC 2d 295 (1969), where the licensee was issued a 1-year renewal on the basis of violations which had taken place at another station which was previously owned by that licensee.

[11] The Bureau also claims that United's petition for reconsideration is inconsistent with a request United has also filed in this proceeding to remand the Initial Decison to the Presiding Judge. In the remand request, the Bureau states, United argues that the Initial Decision is incomplete, unreasoned and confused, whereas in the instant petition United argues that, as it affects WFAN–TV, the Initial Decision is so flawless that it should be implemented immediately.

7. The Bureau also alleges that United's requests that these stations be permitted to remain silent until the hearings are completed is similar to the requests we previously rejected and that to grant them would allow United to "squat" on broadcast channels in the public domain for a prolonged and indefinite period of time contrary to the public interest. Likewise, the Bureau avers that we have previously rejected United's request to sell WMET and other television stations licensed to United. *United Television Company of New Hampshire, supra.* Finally, citing Section 1.106(a)(1) of our Rules, the Bureau argues that the petitions for reconsideration are interlocutory and should not be entertained.[12]

8. In its replies, United states that the Bureau has not addressed itself to the public interest and equitable considerations which would be raised through implementation of our Orders. Further, United contends that its petition for remand (see footnote 11, *supra*) was addressed solely to that portion of the Initial Decision relating to radio station WOOK and that it has encountered "no problem whatsoever" in the Presiding Judge's decision as to WFAN–TV. United suggests that, since the Bureau is the only party objecting to the WFAN–TV portion of the Initial Decision,[13] the Bureau's exceptions could be considered immediately. United next argues that the Bureau's reliance on Section 309(e) of the Communications Act is misplaced, since returning "full and effective" television service to Washington, D.C., and Baltimore, Maryland, certainly would be in the public interest. United alleges that it has been found by the Presiding Judge to be a qualified licensee and, therefore, that there is no barrier or impediment to its requested relief. Concerning the Bureau's comments about its alleged wrongdoing, United remarks that thus far no wrongdoing has been proved. With respect to the Bureau's claim that we have previously denied its request to sell WMET, United observes that the case cited by the Bureau simply stands for the propositions that United will not be allowed to sell *all* of its five television stations and that, where exceptional equities obtain, the sale of a broadcast facility can be authorized even though the character qualifications of the seller are in issue. Since it believes that it is presently impossible to return the existing facilites of WFAN–TV and WMET to the air, United asserts that the circumstances here warrant special equitable relief. Finally, United maintains that the Bureau's argument that the Orders appealed from are interlocutory, is totally without merit.

9. We shall deny United's petitions.[14] United's requests that we immediately implement that portion of the Presiding Judge's Initial Decision which grants the WFAN–TV applications and that we consider the Broadcast Bureau's exceptions at this time, are contrary to our policy and precedent. In *Charles J. Lanphier*, FCC 60–1416, 20

[12] In its comments, Washington Community Broadcasting Co. (Community) notes that it is not interested in the outcome of the television aspect of this proceeding, but it urges that the WOOK aspect not be unnecessarily delayed or postponed because of any action affecting only WFAN–TV.

[13] United assumes that Community would not file exceptions to that portion of the Initial Decision relating to WFAN–TV. See footnote 12, *supra*

[14] Although the Bureau is correct that no final decision has been issued in this proceeding, we are persuaded that the orders in question here are sufficiently final and independent of the underlying licensing proceeding to warrant consideration of United's petitions for reconsideration on the merits.

RR 1077 (1960), an applicant who was successful in an Initial Decision petitioned for severance and an order making that portion of the Initial Decision relating to his application effective immediately. In spite of the fact that none of the parties in their exceptions and briefs objected to the Initial Decision insofar at is pertained to his application, we rejected the request.[15]

10. Here, the Bureau has not yet had an opportunity to file exceptions, and, as the Bureau notes, a grant of United's requests would foreclose consideration of the questions to be raised in the Bureau's exceptions. On the other hand, immediate consideration of the Bureau's exceptions when they are filed would not be conducive to the orderly and efficient disposition of our business, since it would require examination of the Initial Decision and the exceptions and briefs herein on at least two separate occasions. Thus, for the reasons stated in *Lanphier* and in the cases cited in footnote 15, *supra*, we are convinced that United's requests for the immediate implementation of the Initial Decision and for immediate consideration of the Bureau's exceptions thereto must be denied.

11. Similarly, since a grant of United's request that it be permitted to divest itself of Station WMET prior to the conclusion of the hearings involving its character qualifications would require severance of the WMET application from that proceeding, it too must be rejected. In addition, we have previously made it clear that in the absence of exceptional equities United would not be permitted to assign any of its broadcast licenses unless and until all questions regarding the character qualifications of its principal have been resolved favorably to United. See *United Television Co. of New Hampshire*, *supra* at 401–402, and the cases cited therein.[16] United has not cited any precedent and we are not aware of any case which would suggest that allegations of past and prospective financial losses are such "exceptional equities" as to warrant a departure from our previous ruling.

12. We must also reject United's argument that our Orders are inconsistent with the Presiding Judge's Initial Decision. It is a well established principle of administrative law that upon appeal the Initial Decision of a hearing officer is merely advisory and is not binding upon the Commission. Indeed, we have the ultimate responsibility for a decision and are required to make our own findings and conclusions in light of the evidence and exceptions. We may, however, accept, reject or add to any or all of the findings, conclusions and rulings of the hearing officer. Therefore, pending our review, the hearing offi-

[15] See also *Alexandria Broadcasting Corp.*, FCC 61–488, 21 RR 551 (1961); *Greenwich Broadcasting Corp.*, FCC 63R–485, 1 RR 2d 560 (Rev. Bd. 1963); *Southern Radio and Television Co.*, FCC 64R–137, 2 RR 2d 101 (Rev. Bd. 1964); *Kittyhawk Broadcasting Corp.*, 22 FCC 2d 475 (1970); and *Grenco, Inc.*, 37 FCC 2d 873 (1972).

[16] Since United has nothing to assign until it establishes that it is entitled to a renewal of its license for WMET, the situation here is readily distinguishable from *RKO General*, *supra*, where, rather than seeking to dispose of a station, the licensee acquired a new facility which would be subject to our continuing authority, and from the sale of WJMY(TV), where the license was not involved in a hearing and no question had been raised about United's qualifications to remain a licensee of that station. By the same token, the fact that action has been taken against the licensee of one station for deficiencies in the operation of another station which were not brought to our attention until after the license for the latter station had been assigned to a third party, as in *Watkins Glen-Montour Falls*, *supra*, is not relevant to the present case where questions concerning United's qualifications to be a licensee of WMET have been specified for hearing and have not yet been resolved.

cer's initial decision has no final force or effect. Consequently, insofar as a recommended decision of a hearing officer conflicts or is inconsistent with an order of the Commission, the latter must be controlling.[17]

13. In its petitions, United characterizes stations WFAN–TV and WMET as "unlicensed operations" because their renewal applications are in hearing. This description is erroneous. Under Section 307(d) of the Communications Act, United has continuing authority to operate pending a final decision on its applications. Therefore, United is in exactly the same position as is any other Commission licensee with respect to staffing and programming pending a renewal hearing. The complicating factor in this proceeding, the long period of silence, is of United's own making—*it* requested *temporary* authority to remain silent; we did not order United off the air. United has already deprived the public in two different communities of service from stations WFAN–TV and WMET for more than 17 months without holding out any hope that it will be resumed at any time in the foreseeable future.

14. In this connection, Section 73.651(a) of our Rules provides that all television broadcast stations shall maintain a regular minimum daily schedule of operation, and Section 73.667 requires that, upon permanent discontinuance of operation, the license shall be immediately forwarded to us for cancellation. United's present pleadings, however, demonstrate a continuing unwillingness to abide by the provisions of these Rules. Thus, although United indicates that it does not ever propose to resume the operation of WMET and that it is willing to allow WFAN–TV to remain dark for an indefinite period of time bordering on a permanent discontinuance of operation, United refuses to return its licenses so that these channels could be made available to persons who would be interested in providing service for the communities of Washington and Baltimore.[18] As we stated in our previous orders, we are convinced that the present situation is contrary to the public interest and that it should not be allowed to continue at the expense of the viewing audiences in Washington and Baltimore.

15. Finally, United's arguments relating to its allegedly antiquated facilities and financial straits have been previously raised before us and have been rejected. We have, nevertheless, again reviewed these arguments, but we find no reason to depart from our original action.[19] In sum, we find that United has alleged nothing new, and we believe that the public interest will be best served by denying United's petitions for reconsideration, affirming our previous Orders, and directing United to resume operation of Stations WFAN–TV and WMET.

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[17] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933); *NLRB* v. *Oregon Worsted Co.*, 94 F. 2d 671 (9th Cir. 1938); *NLRB* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (3d Cir. 1950).

[18] United's argument as to the delay implicit in any authorization of new facilities is highly speculative. We do not know whether the circumstances cited by United will or will not occur. Nonetheless, we believe that the public interest will be best served by insuring that positive steps are being taken to provide the service contemplated when these facilities were authorized at the earliest possible time.

[19] Indeed, United at several points in its pleadings recognizes that the public interest requires returning service to the populace of Washington, D.C., and Baltimore, Maryland, at the earliest possible time. We are doing nothing more than affording United the opportunity to provide that service and to fulfill its obligations as a Commission licensee.

16. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed May 9, 1973, by United Television Co., Inc., IS DENIED; that it IS DIRECTED to resume the operation of television station WFAN–TV, Washington, D.C., by no later than 12:01 a.m., December 1, 1973; and that it IS DIRECTED to notify this Commission in writing of its proposed course of action within 30 days after the release of this order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-817

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF LICENSE OF UNITED TELEVISION CO. OF NEW HAMPSHIRE FOR TELEVISION STATION WMUR, MANCHESTER, N.H.	Docket No. 19336
In Re Applications of UNITED TELEVISION CO. OF EASTERN MARYLAND, INC., FOR TELEVISION STATION WMET, BALTIMORE, MD. For Renewal of License	Docket No. 19337 File No. BRCT-635
KECC TELEVISION CORP. FOR LICENSE TO COVER CONSTRUCTION PERMIT (BPCT-3079) AS MODIFIED, AUTHORIZING A NEW TELEVISION STATION (KECC-TV) AT EL CENTRO, CALIF.	Docket No. 19338 File No. BLCT-2099

ORDER

(Adopted August 2, 1973; Released August 8, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, WILEY AND HOOKS CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. The Commission has before it for consideration: (a) Orders, FCC 73-372, 40 FCC 2d 474, and FCC 73-371, 40 FCC 2d 472, both released April 9, 1973, directing United Television Company of Eastern Maryland, Inc., and United Television Company, Inc. (hereinafter referred to collectively as "United"), to resume the operation of television stations WMET, Baltimore, Maryland, and WFAN-TV, Washington, D.C., respectively; (b) petitions for reconsideration of (a), above, filed May 9, 1973, by United; (c) oppositions to (b), above, filed May 23, 1973, by the Chief, Broadcast Bureau; (d) comments on (b), above, filed May 22, 1973, by Washington Community Broadcasting Co.; and (e) replies to (c), above, filed June 7, 1973, by United.

2. Due to the interrelationship of the questions raised in this proceeding and the proceeding involving Station WFAN-TV (Docket Nos. 18559, 18561-18563), we have summarized and ruled on all arguments of the parties in our Memorandum Opinion and Order in *United Television Company, Inc.* (*WFAN-TV*), which we have adopted concurrently herewith and which we hereby incorporate by reference.

3. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed May 9, 1973, by United Television Company of Eastern Maryland, Inc., IS DENIED; that it IS DIRECTED to

resume the operation of television station WMET, Baltimore, Maryland, by no later than 12:01 a.m., December 1, 1973; and that it IS DIRECTED to notify this Commission in writing of its proposed course of action within 30 days after the release of this order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 51-317

REPORT ON UNIFORM POLICY AS TO

VIOLATION BY APPLICANTS OF LAWS OF UNITED STATES

In the Matter of ESTABLISHMENT OF A UNIFORM POLICY TO BE FOLLOWED IN LICENSING OF RADIO BROADCAST STATIONS CASES IN CONNECTION WITH VIOLATIONS BY AN APPLICANT OF LAWS OF THE U.S. OTHER THAN THE COMMUNICATIONS ACT OF 1934, AS AMENDED	Docket No. 9572

MARCH 28, 1951.

(The following document was inadvertently omitted from publication in the first series of the FCC Reports)

REPORT OF THE COMMISSION

BY THE COMMISSION: (COMMISSIONERS JONES AND HENNOCK NOT PARTICIPATING).

[591:32] 1. This Report is issued by the Commission in connection with Oral Argument on the above-entitled matter presented to the Commission on April 24, 1950. The argument had been ordered on the Commission's own motion on January 25, 1950, and was originally scheduled to be heard on February 13, 1950, but was continued to April 24, 1950, upon petition of certain parties who requested additional time to prepare.

2. As pointed out in its Notice of Oral Argument, the Commission had placed in its pending files certain broadcast applications on the grounds that the applicants and licensees had been found by a federal court to have violated laws of the United States relating to monopoly, restraint of trade, unfair competition and other matters. It was further pointed out in the Notice that the Commission had not enunciated a policy to be followed in acting on broadcast applications where applicants were so involved. Accordingly, all interested parties were invited to file appearances accompanied by briefs or memoranda and present oral arguments thereon before the Commission en banc with particular reference to the following points:

1. The authority of the Commission to consider in its licensing of broadcast stations the fact that an applicant has violated a law of the United States, other than the Communications Act of 1934, as amended. If the Commission has such authority, is there any basis in policy for not considering such violation.[1]

2. If the Commission has such authority, should there be a difference in procedure or result in any of the following types of situations.

[1] While the Notice of Oral Argument refers to laws of the United States only, the principles hereinafter set forth in this Report also apply to other violations of law. Arguments of some parties to the proceeding related to the authority of the Commission with respect to violations of state and local laws as well as federal laws.

In this connection consideration should be given to the situations involving both comparative hearings and non-comparative hearings:

(a) Whether the finding of the violation is in a civil or criminal case.
(b) Whether the finding of violation is by the United States Supreme Court or by a lower federal court.
(c) Where, after the finding of violation, a decree is entered by an appropriate court which results in the elimination of the practice which was a violation of federal law.
(d) Where there has been no finding of violation but a suit has been filed alleging a violation.
(e) Where there has been no finding of violation or no filing of suit, but the Commission is in possession of information which shows that there has been a violation of federal law.

3. Written briefs and statements were filed by the U.S. Department of Justice, 16 representatives of the broadcasting industry and other members of the public. The parties presented in their written statements much argument and information which have been helpful to the Commission in making a determination of the issues in this proceeding.

4. In approaching these issues, we are concerned with two basic considerations: (1) Under the Communications Act of 1934, as amended, licensees are required by law to operate radio stations in the public interest. (2) The Commission, in its licensing functions, is obligated to see that this legislative mandate is carried out and to encourage the larger and more effective use of radio in the public interest. It is in the light of these requirements that the problems presented here must be considered.

5. Sections 307(a), 309(a) and 310(b) of the Communications Act provide that the Commission *may* grant applications only if the public interest, convenience or necessity will be served. No intelligent appraisal of applicants in terms of this standard can be made without an examination of the basic character qualifications of these applicants, and Congress, in § 308(b) of the Act, specifically gave the Commission authority and imposed upon it the duty to make such examination in evaluating applicants for radio facilities.

6. An important aspect of this examination is the conduct of the applicant. KFKB Broadcasting Association, Inc. v. Federal Radio Commission, 44 F. (2d) 670. Obviously this does not include every phase of an applicant's behavior, but only that part which has some reasonable relationship to ability to operate a broadcast station in the public interest. As pointed out in Mansfield Journal Co. v. Federal Communications Commission, 180 F.(2d) 28, 33, ". . . in determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station . . . it is appropriate that the Commission examine pertinent aspects of the past history of the applicant."

7. We believe a pertinent part of this history would clearly include any violation of Federal law. We have in the past considered various types of unlawful conduct including violations of Internal Revenue laws, conspiracy to violate anti-trust laws, false advertising and other deceptive practices, in passing upon qualifications of applicants. In this respect we have been sustained by the Courts. In Mester et al v. United States, et al, 70 F Supp. 118, affirmed per curiam 332 U.S. 820, the U.S. District Court for the Eastern District of New York

stated that the Commission might consider as one element of evaluation the applicant's flagrant disregard and violation of various U.S. government regulations designed for public protection. In National Broadcasting Company v. United States, 319 U.S. 190, 222, the Supreme Court stated that the Commission is permitted to exercise its judgment as to whether violation of the anti-trust laws disqualify an applicant from operating a station in the public interest; and "might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." It must be concluded, therefore, that the Commission's authority to consider violation of Federal laws, other than the Communications Act of 1934, in evaluating applicants for radio facilities is well established and that a positive duty is imposed upon us to exercise this authority.

8. As the courts have held, by exercising such authority we are not encroaching upon the administrative and enforcement jurisdictions of other governmental agencies or the courts. Thus, in the above-mentioned National Broadcasting Company case we pointed out to the Court that in adopting the network regulations we were not attempting to apply the anti-trust laws as such, but were concerned only with practices violative of the anti-trust laws to the extent that they "had a bearing upon the matters which were entrusted to the Commission." The Supreme Court expressed its approval of this interpretation. In the Mester case, *supra*, we were not attempting to impose penalties for violations of laws administered by the Federal Trade Commission and the Office of Price Administration, but rather considered such violations along with other conduct pertinent to a determination whether the applicant had the qualifications to operate a broadcast station as required by the Communications Act.

9. The contention has been made by parties in the proceeding that no blanket policy should be adopted by the FCC which would absolutely disqualify applicants for radio facilities where they are found to have violated a federal law or which would attempt to specify the exact weight or significance to be given by the Commission to such violations. Such evaluations, it was argued, should be made only on a case-to-case basis in the light of the specific facts involved in and related to the violation. We are in general agreement with this contention. As mentioned above, the Commission must be satisfied that an applicant has the requisite qualifications to assure that public interest will be served by a grant of this application. This determination cannot be made on the basis of isolated facts but should include a careful, critical analysis of all pertinent conduct of the applicant. We believe, that if an applicant is or has been involved in unlawful practices, an analysis of the substance of these practices must be made to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest. We do not believe that the outcome of this determination should be prejudged by the adoption of any general rule forbidding any grant in all cases where unlawful conduct of any kind or degree can be shown. Nor do we believe that any rule could adequately prescribe what type of conduct

may be considered of such a nature that in all cases it would be contrary to the public interest to grant a license.

10. While we have determined that no blanket policy should be enunciated, in view of the apparent confusion which has existed with respect to the subject of this proceeding, and the concern expressed by those whose interests have been or may be affected in the future, we believe it will be helpful to set forth what we think is the correct approach for properly determining on a case-to-case basis the weight to be given violations of Federal law other than the Communications Act. By so doing, we are not attempting to set up a "trick substitute" for the exercise of administrative discretion. With respect to the particular matter which is the subject of this Report, there is no easy formula or slide rule which can be used to give the answer to every such case that comes before us. We must and will decide each case on its individual merits. But in the interest of clarity, we are simply stating some of the factors which we believe should and must be considered before sound judgments can be made.

11. It has been urged upon us that the violation of a U.S. law per se raises no presumption adverse to an applicant. With this point of view we do not agree. Violations of Federal laws, whether deliberate or inadvertent, raise sufficient question regarding character to merit further examination. While this question as to character may be overcome by countervailing circumstances, nevertheless, in every case, the Commission must view with concern the unlawful conduct of any applicant who is seeking authority to operate radio facilities as a trustee for the public. This is not to say that a single violation of a Federal law or even a number of them necessarily makes the offender ineligible for a radio grant. There may be facts which are in extenuation of the violation of law. Or, there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest. In all such cases, a matter of prime concern is whether the violation was committed inadvertently or wilfully. Innocent violations are not as serious as deliberate ones.

12. As has been suggested by parties in this proceeding, another matter of importance is whether the infraction of law is an isolated instance or whether there have been recurring offenses which establish a definite pattern of misbehavior. A single transgression of law, particularly if inadvertently committed, might raise little question with respect to qualifications, whereas a continuing and callous disregard for laws may justify the conclusion that the applicant cannot be expected in the future to demonstrate a responsible attitude toward his obligations as a broadcast licensee. In this connection, the matter of time is important. There necessarily must be more concern with recent violations than with those which occurred in the remote past and have been followed by a long period of consistent adherence to law and exemplary conduct on the part of the applicant. Cases which must be viewed with most critical scrutiny are those where the applicant has been involved in violations over a long period of time or is presently engaged in illegal practices. In all such cases a strong presumption of ineligibility is raised and a heavy burden of proof is imposed on the

applicant to show he is qualified to operate a broadcast station in the public interest.

13. It is irrelevant to a determination of qualifications whether the finding of violation is in a civil or criminal case. In either case it is the conduct of the applicant and not the type of suit brought that is important. For as pointed out by the Department of Justice in its Memorandum, "while the bringing of a criminal case may sometime indicate a more flagrant and willful disregard of the anti-trust laws than does the filing of a civil complaint, so many factors enter into determination of the type of action to be brought that whether the suit was civil or criminal has little relationship to the question whether the defendant's acts were in deliberate disregard of the anti-trust laws or whether his violation was flagrant or persistent."

14. Furthermore, it is not the particular tribunal which makes the finding, but the finality of the decree which is significant. We see no logical basis for giving greater evidentiary weight in character determination to a final decree of the higher court than to that of a lower court from which no appeal was taken.

15. The question is presented as to what significance should be given to the fact that a suit alleging a violation of law has been filed against an applicant or where the Commission is in possession of facts showing that the applicant has violated the law but where there has been no final adjudication by an appropriate authority. The fact that suit has been instituted is not the important consideration. The questions raised and facts involved, however, may be of concern to the Commission. As hereinabove pointed out, the Commission has the authority to examine pertinent aspects of the past history of an applicant and this history, of course, includes any violation of federal law. Even though no suit alleging illegal conduct has been filed, or if one has been filed but has not been heard or finally adjudicated, the Commission may consider and evaluate the conduct of an applicant in so far as it may relate to matters entrusted to the Commission. (See National Broadcasting Company v. United States, and Mansfield Journal Company v. Federal Communications Commission, *supra*.)

16. Thus far we have been discussing violations of Federal law in general. However, as indicated in the Notice of Oral Argument in this proceeding, violations of anti-trust laws have been the principal basis for the Commission's concern in this matter. Most of the parties who presented argument have at one time or another been the subject of prosecution or conviction under the Sherman Anti-trust laws and have filed applications for new or changed radio facilities upon which action has been postponed by the Commission pending a determination of this matter. We believe, therefore, that such violations deserve special treatment in this report.

17. Congressional concern with free competition in the broadcasting field is evident in the very explicit and specific provisions of §§ 311 and 313 making the anti-trust laws applicable to broadcasting. This concern is amplified in the legislative history of these provisions. As the Supreme Court pointed out in Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 137, Congress in setting up the Communications Act of 1934 "moved under the spur of a

widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." As the Supreme Court further pointed out in Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 478 (1940) "the Act recognizes that the field of broadcasting is one of free competition." In that case the Court held that the Act "expressly negatives" the idea of monopoly in the broadcasting field. It is clear from the legislative history of the Act and from various provisions therein that Congress conceived as one of the Commission's major functions the preservation of competition in the radio field and the protection of the public as against the private interest.

18. It has been argued that there is no need or basis for the Commission to disqualify applicants because they have been involved in violations of the anti-trust laws since the Commission has the means of preventing the growth of monopolistic practices in radio. Thus, it is contended that if we effectively enforce the duopoly and multiple ownership rules there can be no real danger of a monopoly developing in the broadcasting field. This argument misses the point of the discussion in this Report. While it is true that enforcement of the Commission's multiple ownership rules can prevent any applicant from acquiring an excessive number of stations, there are many other monopolistic practices against which there are no rules. And while in the course of time, where such practices are discovered the Commission can adopt rules which might prevent recurrence of these monopolistic practices, the fact remains that such monopolistic practices might exist for a long period of time before they are discovered or corrected. During this period the existence of these restrictive practices can prevent the maximum development of broadcasting not only for that period but also for the future. It is well known that once certain practices develop, it is exceedingly difficult in applying corrective measures to restore the situation to the same healthy conditions that would have prevailed had not the restrictive conditions been permitted to arise at all. Thus, it is important that only those persons should be licensed who can be relied upon to operate in the public interest, and not engage in monopolistic practices. When passing upon applications of persons who have engaged in monopolistic practices in other industries, the Commission must be concerned as to whether such persons would also engage in monopolistic practices in radio if they were given a license. Their conduct in other fields is obviously a matter which the Commission must consider in determining whether they possess the requisite qualifications of a licensee.

19. Much of the argument in this proceeding related to the major motion picture companies who have violated the anti-trust laws over a period of years in the motion picture field. It is obvious from what we have already said that violation of the anti-trust laws by the motion picture companies is a matter that the Commission must consider carefully in determining the qualifications of these companies to operate in the public interest.

20. A somewhat related matter in so far as motion picture companies are concerned merits some discussion. It has come to the Commission's attention that many motion picture companies refuse to make copies of their films available for use by television stations. Similarly,

restrictions are imposed by these companies as to the appearance of actors under contract to the studio or television programs and to the use on television of stories or plays whose rights have been acquired by the studio. We express no opinion at this time as to whether such practices are or are not in violation of the anti-trust laws. We do desire, however, to point out that whether or not these practices are a violation of any law they are considered by the Commission to be relevant in determining the qualifications of applicants utilizing such practices. It is obvious that the success of television will depend to a large measure on the ability of television stations to acquire the best available films and to utilize the best available talent and stories in their programs. Motion picture companies, of course, have the same interest. When a television station is owned by a licensee other than a motion picture company, it will compete vigorously with the motion picture companies to secure the best available films, talent and stories for use over his station. Where a television station is owned by a motion picture company which imposes restrictions on the use of films, talent or stories on television stations, obviously a conflict of interest is created and the conflict is likely to be resolved against the television station where the investment in the motion picture part of the enterprise is greater than in the television properties. In such a case, a serious policy question is presented as to whether the Commission fulfills its obligation to encourage the largest and most effective utilization of television in the public interest when it licenses the station to a person with an obvious conflict of interest which can prevent him from utilizing television to its utmost.

21. In this Report we have attempted to discuss as clearly as possible what we consider to be basic matters of concern in this proceeding. For the benefit of the general public and in fairness to the parties in this proceeding as well as others who have applications pending and who may be making plans for further expansion in the broadcasting field we have set forth what we consider the primary principles which should guide us in making a case-to-case determination of these applications.

The Commission, at a meeting on April 12, 1951, (Commissioners Coy, Walker, Hyde, Webster and Jones participating) addressed the following letter to United States Senator Wiley [Public Notice 62856]:

"This will acknowledge your letter dated March 31, 1951, in which you discuss the Commission's Report on the Establishment of a Uniform Policy to be followed in Licensing of Radio Broadcast Station cases in connection with violation by an applicant of laws of the United States other than the Communications Act of 1934, as amended, Docket No. 9572. Your interest in writing the Commission regarding this matter is appreciated and we respectfully submit the following comments in answer to your letter.

"The purpose of the report was to set forth some basic principles to guide the Commission in making a determination of the applications involving violations of laws other than the Communications Act of 1934. As you know, the problems presented in connection with this matter are difficult ones and in releasing the report it was our desire to give the parties in the proceeding as well as the general public an honest statement of our thinking and approach to these problems. It was our desire to make known what we consider to be basic matters

of concern in the proceeding. As you will note, we were very careful in the report to make clear that we were not prejudging any application and most assuredly there was no intention to indict any party involved in the proceeding. We were careful to state in the report that each case must be determined on its individual merits and as we pointed out in Paragraph 9, we do not believe that the outcome of such a determination should be prejudged by the adoption of any general rule forbidding any grant in all cases where unlawful conduct of any kind or degree can be shown.

"As we have pointed out in our report, the Commission has received information to the effect that certain segments of the motion picture industry have engaged in practices, which, if true, may raise questions as to the broadcast qualifications of the parties engaged in such practices. Inasmuch as a number of the parties in this proceeding are motion picture producers and distributors we thought it only fair to apprise them of these reports and of the questions which have been raised. But we wish to stress the point that as to the merits of such reports and, if true, as to whether the conduct alleged is or is not in violation of the Anti-Trust laws and as to what weight should be given such practices in terms of the qualifications of the licensees, we have made no determination. Such determination, if made, would have to be and will be made in accordance with § 309(a) of the Communications Act of 1934, as amended, which provides that when the Commission cannot determine that the grant of any application is in the public interest it will give the party or parties involved an opportunity to be heard.

"The Commission is under a legislative mandate to encourage the larger and more effective use of radio in the public interest. Therefore, we felt in fairness to the movie interests involved in this proceeding, as well as the general public, that we should inform them of our concern regarding what may be a conflict of interest which motion picture producers and distributors might have in the operation of television stations. This problem was referred to in certain materials and discussion which are a part of Docket 9572 in the subject proceeding. Whether this conflict is substantial enough to disqualify any applicant we certainly have made no final judgment. Should we be unable to resolve this and other questions we shall, of course, formulate specific issues and give all interested parties an opportunity to appear in formal hearings. If and when such procedure is decided upon, all interested parties will be informed and given opportunity to be heard in accordance with § 309(a) of the Communications Act of 1934, as amended.

"The Commission felt that it was fairer to all concerned to bring these problems to light while there is still a freeze on television applications than to wait until the conclusion of hearings on individual applications and raise it then for the first time.

"With respect to the Administrative Procedure Act, your attention is invited to Section 3 thereof which refers to the publication in the Federal Register of any statements of general policy or interpretations formulated and adopted by any agency for the guidance of the public. As pointed out in the Attorney General's Manual on the Act, an agency is 'free to determine for itself the desirability of formulating policy statements for the guidance of the public', and to the extent that such statements of general policy are enunciated they are required to be published in the Federal Register. In accordance with the Administrative Procedure Act the Commission's Report has been given the required publication and the public has been appropriately informed as to the basic principles which we have enunciated to guide us in making a determination of the cases before us.

"Your office advised us by telephone that you desire that we disregard Paragraphs 3 and 4, page 2, of your letter which refer to Twentieth Century Fox. Accordingly, we have made no comments with respect thereto.

"We think you will agree, therefore, that our procedure in this case represents the fullest fruition of the democratic process and that it is in strict compliance with the provisions of the Communications Act of 1934 and the Administrative Procedure Act.

"We appreciate your giving us the benefit of your views in this matter and hope that this letter will satisfactorily answer the inquiry which you have presented to us."